TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 498.

MARGARET FRENCH AND HENRY FRENCH, OLIVER H. DEAN, TRUSTEE FOR W. D. McLEOD, AND WILLIAM D. McLEOD, PLAINTIFFS IN ERROR,

vs.

THE BARBER ASPHALT PAVING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED DECEMBER 6, 1900.

(17,983.)

33902

(17,983.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 498.

MARGARET FRENCH AND HENRY FRENCH, OLIVER H. DEAN, TRUSTEE FOR W. D. McLEOD, AND WILLIAM D. McLEOD, PLAINTIFFS IN ERROR,

vs.

THE BARBER ASPHALT PAVING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation and service (omitted in printing)	3	—
Transcript from circuit court of Jackson county	4	2
Petition	4	2
Answer of French *et al.* (parts omitted in printing)	15	9
Answer of Dean *et al.*	57	16
Reply	58	16
Judgment entry	59	17
Motion for new trial and in arrest filed and overruled; bill of exceptions signed and filed; bond and affidavit for appeal filed; appeal granted	61	18
Bill of exceptions	62	19
Special tax bill No. 73 (omitted in printing)	63	—
Testimony of John Donnelly	66	20
W. S. Woods	69	21
E. H. Phelps	71	23
John Stevens	73	24

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 19, 1900.

Articles 2 and 6 of Revised Ordinances, Kansas City (omitted in printing)	75	—
Testimony of Henry R. Kasson (omitted in printing)	76	—
E. B. Demarest " "	77	—
Ordinance to pave Forest avenue from Independence avenue to Twelfth street	80	25
Contract and specifications for paving Forest avenue from Independence avenue to Twelfth street (part omitted in printing)	83	27
Bond for maintenance of asphalt pavement (omitted in printing)	101	—
Defendant's declarations of law	102	33
Motion for new trial	104	34
Motion in arrest of judgment	105	35
Bond for appeal (omitted in printing)	107	—
Affidavit for appeal " "	108	—
Circuit clerk's certificate	108	35
Cause argued and submitted	109	36
Judgment	109	36
Opinion	109	36
Petition in error (omitted in printing)	131	—
Assignment of errors	133	50
Appeal bond (omitted in printing)	136	—
Clerk's certificate	137	51
Stipulation as to printing record	138	52

1 UNITED STATES OF AMERICA, *ss.:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court of the State of Missouri, in bank, before you, being the highest court of law and equity of the said State, at the October term thereof, 1900, in which a decision could be had in the said suit between Margaret French and Henry French, Oliver H. Dean, trustee for W. D. McLeod, and William D. McLeod, plaintiffs in error herein (defendants below), and The Barber Asphalt Paving Company, defendant in error herein (plaintiff in the court below), wherein was drawn in question the validity of a statute of the *statute* of Missouri and an authority exercised under the statute of the State of Missouri, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such the validity of said State law, and wherein was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the title, right, privilege, and exemption specially set up and claimed under such clause of the said Constitution, a manifest error hath happened, to the great damage of said Margaret French and Henry French, Oliver H. Dean, trustee for W. D. McLeod, and William D. McLeod, plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date of the citation herein, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, on this 14th day of November, A. D. 1900.

(Seal of the United States Circuit Court, Central Division, for the Western District of Missouri.)

H. C. GEISBERG,
Clerk of the United States Circuit Court for the Central
2 *Division of the Western District of Missouri.*

Allowed to operate as a supersedeas by—

JAMES B. GANTT,
Chief Justice of the Supreme Court of the State of Missouri.

Return to Writ.

STATE OF MISSOURI, *set:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In testimony whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 26th day of November, A. D. 1900.

Seal of the Supreme Court of Missouri.

JNO. R. GREEN, *Clerk.*

2½–3½ [Endorsed:] Ready. Case Number, —. Margaret French and Henry French, Oliver H. Dean, trustee, and William D. McLeod, plaintiffs in error, *vs.* The Barber Asphalt Paving Company, defendant in error. Writ of error. Filed Nov. 15, 1900. Jno. R. Green, clerk.

4 In the Supreme Court of Missouri.

STATE OF MISSOURI, *set:*

Be it remembered that heretofore, to wit, on the 24th day of April, 1900, there was filed in the office of the clerk of the supreme court of the State of Missouri a transcript wherein The Barber Asphalt Paving Company was respondent and Margaret French and others were appellants; which said transcript is in words and figures as follows, to wit:

Be it remembered that on the 23rd day of May, A. D. 1899, there was filed in the office of the clerk of the circuit court of Jackson county, State of Missouri, at Kansas City, a petition in the cause wherein The Barber Asphalt Paving Company is plaintiff and Margaret French *et al.* are defendants. Said petition is in words and figures as follows, to wit:

In the Circuit Court of Jackson County, Missouri, Sitting at Kansas City, October Term, 1899.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
MARGARET FRENCH and HENRY FRENCH, Her Husband; Oliver H. Dean, Trustee for W. D. McLeod, and W. D. McLeod, Defendants. } No. 36276.

Petition.

Plaintiff, for first cause of action against the defendants, states it is a corporation duly created and existing under and by virtue of the laws of the State of West Virginia; that it has duly complied with the laws of the State of Missouri with reference to foreign corporations doing business in said State and is authorized to do

business in the State of Missouri; that Kansas City is a municipal corporation duly created and existing under and by virtue of the laws of the State of Missouri, and as such, by its certain ordinance number 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street," approved July 17th, 1894, provided for the paving of Forest avenue
5 from Independence avenue to Twelfth (12th) street, in said city; that the board of public works of said city, pursuant to and by virtue of said ordinance and the powers in it vested by law, duly awarded the contract for the work aforesaid to the Barber Asphalt Paving Company, which contract was duly confirmed by the mayor and common council of said city; that the work aforesaid has been done and completed according to the terms of such contract by the Barber Asphalt Paving Company and has been accepted by said city; that after the completion of the work aforesaid the cost thereof was duly assessed and apportioned against the land chargeable therewith, as provided by law, and especially as provided by article IX of the charter of said city, adopted on April the 8th, 1889; that thereafter, to wit, on the 15th day of October, 1894, the said city, acting by and through its board of public works, made out and issued to the plaintiff a certain special tax bill, payable in four equal installments, in part payment of the cost of the work aforesaid, the fourth and last installment of which bill is hereto attached, herewith filed, and made a part of this petition, the contents of which *is* as follows, to wit:

THE STATE OF MISSOURI:

No. 73. Ordinance No. 5891.

Kansas City Special Tax Bill.

Issued on the installment plan.

This certifies that the following-described real estate, situated in the corporate limits of Kansas City, county of Jackson, Missouri, as follows, to wit, lot 12, block H, Ranson & Tally's add. to the city of Kansas, now Kansas City, Mo., has been charged with the sum of three hundred and two (302) dollars and fifty-two (52) cents as a special tax for paving Forest avenue from Independence avenue to Twelfth (12th) street, as provided by ordinance No. 5891 of
6 Kansas City, Missouri, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street, approved July 17th, 1894." Said work has been completed according to contract by the Barber Asphalt Paving Company, contractor, to whom this special tax bill is issued in part payment therefor, and the sum mentioned has been duly assessed and apportioned against the aforesaid land, being the exact amount chargeable against said land, as provided by law, for its proportion of the cost of such work as a lien against said land for a period of one (1) year after the last installment specified herein shall have become due and payable, and no longer, unless within such year suit shall have been instituted to

collect this tax *by* bill, and notice of the bringing of such suit shall have been filed with the city treasurer, in which case the lien of this tax bill shall continue until the termination of such suit and until the sale of the property under execution on the judgment establishing the same, and no default in the payment of any previous installment hereinafter mentioned shall operate to diminish the period during which such lien shall continue.

This tax bill is payable in four (4) equal installments of seventy-five (75) dollars and sixty-three (63) cents each, on presentation of the three (3) installment coupons hereto attached at maturity thereof, the fourth and last installment of seventy-five (75) dollars and sixty-three (63) cents being payable on the 31st day of May, 1898, with interest thereon, as herein mentioned, on the surrender and cancellation of this tax bill. This tax bill bears interest from the date of issue at the rate of seven (7) per cent. per annum, and when any installment becomes due and collectible, as herein provided, interest thereon and on all unpaid installments shall be due and collectible to that date. If any installment of this tax bill or interest thereon be not paid when due, then all remaining installments shall become due and collectible, together with interest thereon, at the rate
7 of ten (10) per cent. per annum, from the date of issue of this tax bill, less the sum of any interest that may have already been paid on such installments. It is provided, however, that the owner of the property charged with the payment of this tax bill or the owner of any interest therein shall have the privilege of paying same in full at any time before the expiration of thirty (30) days from the date of the issue hereof without interest; and it is provided further that the owner of the property charged with the payment of this tax bill or the owner of any interest therein shall have the privilege of paying this tax bill in full, at any time, by paying the interest thereon to a period of ninety (90) days after the date of such payment, unless such payment is made within less than ninety (90) days of the maturity of the next installment, and then by paying interest thereon to the date when the next installment becomes due and payable.

Given by the authority of the board of public works of Kansas City, Missouri, this 15th day of October, 1894.

PETER H. TIERNAN, *President.*
By JOHN MOLONY.

That the said Barber Asphalt Paving Company receipted to the board of public works for the tax bills issued to it for the doing of the work aforesaid on the 15th day of October, 1894, and less than one year has elapsed since the fourth and last installment of said tax bill became due and payable, and by reason of the premises the said lot 12, block H, Ranson & Tally's add'n, is legally chargeable in favor of the Barber Asphalt Paving Company, on account of the cost of the work aforesaid, with the sum of seventy-five (75) dollars and sixty-three (63) cents with interest on such sum from the 15th day of October, 1894, at the rate of ten per cent. per annum; that plaintiff is now the owner and holder of the fourth and last

8 installment of the tax bill aforesaid, and that the same is now due and unpaid; that defendants own or claim to own the land described in the fourth and last installment of said bill and hereinbefore described or some estate or interest therein.

Wherefore plaintiff prays for a special judgment against the defendants for the sum of seventy-five and .63 (75.63) dollars, with interest as aforesaid, and for the enforcement of the lien of the fourth and last installment of said tax bill against the land aforesaid, as provided by law, and for costs.

Plaintiff, for second cause of action against the defendants, states that it is a corporation duly created and existing under and by virtue of the laws of the State of West Virginia; that it has duly complied with the laws of the State of Missouri with reference to foreign corporations doing business in said State, and is authorized to do business in the State of Missouri; that Kansas City is a municipal corporation, duly created and existing under and by virtue of the laws of the State of Missouri, and as such, by its certain ordinance number 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street," approved July 17th, 1894, provided for the paving of Forest avenue from Independence avenue to Twelfth (12th) street, in said city; that the board of public works of said city, pursuant to and by virtue of said ordinance and the powers in it vested by law, duly awarded the contract for the work aforesaid to the Barber Asphalt Paving Company, which contract was duly confirmed by the mayor and common council of said city; that the work aforesaid has been done and completed according to the terms of such contract by the Barber Asphalt Paving Company, and has been accepted by said city; that after the completion of the work aforesaid the cost thereof was duly assessed and apportioned against the land chargeable therewith, as provided by law, and especially as provided by article IX of the charter of said city, adopted on April the 8th, 1889; that

9 thereafter, to wit, on the 15th day of October, 1894, the said city, acting by and through its board of public works, made out and issued to the plaintiff a certain special tax bill, payable in four equal installments, in part payment of the cost of the work aforesaid, the third installment of which bill is hereto attached, herewith filed, and made a part of this petition, the contents of which *is* as follows, to wit:

Third Installment.

Issued for seventy-five (75) dollars and sixty-three (63) cents, being one-fourth (¼) of special tax bill No. 73, issued on the installment plan to the Barber Asphalt Paving Company, contractor, for paving Forest avenue from Independence avenue to Twelfth (12th) street, as provided in ordinance No. 5891 of the common council of Kansas City, approved July 17th, 1894.

This the third installment coupon is due and collectible on the 31st day of May, 1897, and bears interest, at the rate of seven (7) per cent. per annum, from the date of issue.

Issued by authority of the board of public works this 15th day of October, 1894.

PETER H. TIERNAN, *President*,
By JOHN MOLONY.

That the said Barber Asphalt Paving Company receipted to the board of public works for the tax bills issued to it for the doing of the work aforesaid on the 15th day of October, 1894, and less than one year has elapsed since the fourth and last installment of said tax bill became due and payable, and by reason of the premises lot 12, block H, Ranson & Tally's add., in Kansas City, Mo., is legally chargeable in favor of the Barber Asphalt Paving Company, on account of the cost of work aforesaid, with the sum of seventy-five (75) dollars and sixty-three (63) cents, with interest on such sum from the 15th day of October, 1894, at the rate of ten per cent. per annum; that plaintiff is now the owner and holder of the
10 third installment of the tax bill aforesaid, and that the same is now due and unpaid; that defendants own or claim to own the land described in the fourth and last installment of said bill and hereinbefore described or some estate or interest therein.

Wherefore plaintiff prays for a special judgment against the defendants for the sum of seventy-five and .63 (75.63) dollars, with interest as aforesaid, and for the enforcement of the lien of the third installment of said tax bill against the land aforesaid, as provided by law, and for costs.

Plaintiff, for third cause of action against the defendants, states that it is a corporation duly created and existing under and by virtue of the laws of the State of West Virginia; that it has duly complied with the laws of the State of Missouri with reference to foreign corporations doing business in said State, and is authorized to do business in the State of Missouri; that Kansas City is a municipal corporation, duly created and existing under and by virtue of the laws of the State of Missouri, and as such, by its certain ordinance number 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street," approved July 17th, 1894, provided for the paving of Forest avenue from Independence avenue to Twelfth (12th) street, in said city; that the board of public works of said city, pursuant to and by virtue of said ordinance and the powers in it vested by law, duly awarded the contract for the work aforesaid to the Barber Asphalt Paving Company, which contract was duly confirmed by the mayor and common council of said city; that the work aforesaid has been done and completed according to the terms of such contract by the Barber Asphalt Paving Company, and has been accepted by said city; that after the completion of the work aforesaid the cost thereof was duly assessed and apportioned against the land chargeable therewith, as provided by law, and es-
11 pecially as provided by article IX of the charter of said city, adopted on April the 8th, 1889; that thereafter, to wit, on the 15th day of October, 1894, the said city, acting by and through its board of public works, made out and issued to the plaintiff a certain special tax bill, payable in four equal installments, in part payment

the cost of the work aforesaid, the second installment of which
] is hereto attached, herewith filed, and made a part of this peti-
n, the contents of which *is* as follows, to wit:

Second Installment.

Issued for seventy-five (75) dollars and sixty-three (63) cents, being
e-fourth (¼) of special tax bill No. 73, issued on the installment
an to the Barber Asphalt Paving Company, contractor, for paving
orest avenue from Independence avenue to Twelfth (12th) street, as
ovided in ordinance No. 5891 of the common council of Kansas
ty, approved July 17th, 1894.

This the second installment coupon is due and collectible on the
st day of May, 1896, and bears interest, at the rate of seven (7) per
nt. per annum, from the date of issue.

Issued by authority of the board of public works this 15th day of
ctober, 1894.

PETER H. TIERNAN, *President*,
By JOHN MOLONY.

That the said Barber Asphalt Paving Company receipted to the
oard of public works for the tax bills issued to it for the doing of
he work aforesaid on the 15th day of October, 1894, and less than
ne year has elapsed since the fourth and last installment of said
ax bill became due and payable, and by reason of the premises the
ot 12, block H, Ranson & Tally's add'n, in Kansas City, Mo.,
s legally chargeable in favor of the Barber Asphalt Paving Com-
any, on account of the cost of work aforesaid, with the sum of
eventy-five (75) dollars and sixty-three (63) cents, with interest on
uch sum from the 15th day of October, 1894, at the rate of ten per
cent. per annum; that plaintiff is now the owner and holder
12 of the second installment of the tax bill aforesaid, and that
the same is now due and unpaid; that defendants own or
laim to own the land described in the fourth and last installment
of said bill and hereinbefore described or some estate or interest
herein.

Wherefore plaintiff prays for a special judgment against the de-
fendants for the sum of seventy-five and .63 (75.63) dollars, with in-
terest, as aforesaid, and for the enforcement of the lien of the second
installment of said tax bill against the land aforesaid, as provided
by law, and for costs.

Plaintiff, for fourth cause of action against the defendants, states
that it is a corporation duly created and existing under and by virtue
of the laws of the State of West Virginia; that it has duly complied
with the laws of the State of Missouri with reference to foreign cor-
porations doing business in said State, and is authorized to do busi-
ness in the State of Missouri; that Kansas City is a municipal cor-
poration, duly created and existing under and by virtue of the laws
of the State of Missouri, and as such, by its certain ordinance num-
ber 5891, entitled "An ordinance to pave Forest avenue from Inde-
pendence avenue to Twelfth (12th) street," approved July 17th

1894, provided for the paving of Forest avenue from Independence avenue to Twelfth (12th) street, in said city; that the board of public works of said city, pursuant to and by virtue of said ordinance and the powers in it vested by law, duly awarded the contract for the work aforesaid to the Barber Asphalt Paving Company, which contract was duly confirmed by the mayor and common council of said city; that the work aforesaid has been done and completed according to the terms of such contract by the Barber Asphalt Paving Company, and has been accepted by said city; that after the completion of the work aforesaid the cost thereof was duly assessed and apportioned against the land chargeable therewith as pro-
15 vided by law, and especially as provided by article IX of the charter of said city, adopted on April the 8th, 1889; that thereafter, to wit, on the 15th day of October, 1894, the said city, acting by and through its board of public works, made out and issued to the plaintiff a certain special tax bill, payable in four equal installments, in part payment of the cost of the work aforesaid, the first installment of which bill is hereto attached, herewith filed, and made a part of this petition, the contents of which *is* as follows, to wit:

First Installment.

Issued for seventy-five (75) dollars and sixty-three (63) cents, being one-fourth (¼) of special tax bill No. 73, issued on the installment plan to the Barber Asphalt Paving Company, contractor, for paving Forest avenue from Independence avenue to Twelfth (12th) street, as provided in ordinance No. 5891 of the common council of Kansas City, approved July 17th, 1894.

This the first installment coupon is due and collectible on the 31*d*t day of May, 1895, and bears interest, at the rate of seven (7) per cent. per annum, from the date of issue.

Issued by authority of the board of public works this 15th day of October, 1894.

PETER H. TIERNAN, *President.*
By JOHN MOLONY.

That the said Barber Asphalt Paving Company receipted to the board of public works for the tax bills issued to it for the doing of the work aforesaid on the 15th day of October, 1894, and less than one year has elapsed since the fourth and last installment of said tax bill became due and payable, and by reason of the premises lot 12, block H, Ranson & Tally's add'n, in Kansas City, Mo., is legally chargeable in favor of the Barber Asphalt Paving Company,
14 on account of the cost of work aforesaid, with the sum of seventy-five dollars and sixty-three (63) cents, with interest on such sum from the 15th day of October, 1894, at the rate of ten per cent. per annum; that plaintiff is now the owner and holder of the first installment of the tax bill aforesaid, and that the same is now due and unpaid; that defendants own or claim to own the land described in the fourth and last installment of said bill and hereinbefore described or some estate or interest therein.

Wherefore plaintiff prays for a special judgment against the defendants for the sum of seventy-five and .63 (75.63) dollars, with interest as aforesaid, and for the enforcement of the lien of the first installment of said tax bill against the land aforesaid, as provided by law, and for costs.

SCARRITT, GRIFFITH & JONES,
Attorneys for Plaintiff.

Be it remembered that on the 3rd day of the regular October term, A. D. 1899, of the circuit court of Jackson county, State of Missouri, at Kansas City, the same being the 11th day of October, A. D. 1899, the following proceedings were had and made of record in the cause entitled:

BARBER ASPHALT PAVING CO.
vs.
MARGARET FRENCH ET AL. } No. 36276.

Defendants Margaret French and Henry French file herein answer.

Said answer is in words and figures as follows, to wit:

15 In the Circuit Court of Jackson County, Missouri, Sitting at Kansas City, April Term, 1900.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
MARGARET FRENCH, HENRY FRENCH, Her Husband; Oliver H. Dean, Trustee for W. D. McLeod, and W. D. McLeod, Defendants. } No. 36276.

Answer.

This day come the defendants Margaret French and Henry French, and for answer to the first count in plaintiff's petition say defendants are now and were at the time this suit was brought the owners in fee and in possession of lot twelve (12), in block H, in Ranson & Tally's addition to the city of Kansas, now Kansas City, Missouri, being the same lot mentioned in plaintiff's petition, and against which plaintiff seeks to enforce special tax bill sued on in the first count of plaintiff's petition. Forest avenue was paved from Independence avenue to Twelfth (12th) street, in Kansas City, by the plaintiff, The Barber Asphalt Paving Company, and on completion of said work the board of public works of Kansas City, Missouri, computed the cost thereof under the contract between Kansas City and the contractor and apportioned the cost thereof according to the frontage of all real estate fronting on Forest avenue from Independence avenue to Twelfth (12th) street, and charged against lot twelve (12), in block H, in Ranson-Tally's addition, its proper proportion of such charge according to the frontage of said lot. The total cost of said work was $28,339.54 *dollars*, and the total frontage on said street paved was 4,683.95 feet. Plaintiff paved said Forest avenue from Independence avenue to Twelfth

(12th) street under and by virtue of a contract in writing
16 between the Barber Asphalt Paving Company, of the one part, and Kansas City, of the other part, in and by the terms of which said contract said Barber Asphalt Paving Company was to pave said street, and on said contract, by its terms and conditions, Kansas City was not to be liable for said paving or any part thereof or in any way except by the issue of special tax bills against the land and lots fronting on the streets so paved; the amount of the tax bill on each lot was to be according to the frontage on said street. The said contract to pave Forest avenue from Independence avenue to Twelfth (12th) street was authorized by ordinance No. 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street." There was no other or further authority for said contract. Said ordinance provided that Forest avenue should be paved from Independence avenue to Twelfth, 12th, street according to certain plans and specifications on file in the city engineer's office: that the work should — begun within ten days after a contract therefor bound and took effect, and should be completed within sixty days thereafter, and that the cost of the work should be paid for in special tax bills issued against the lot and lands fronting on Forest avenue from Independence avenue to Twelfth (12th) street, according to law.

There was and is no law authorizing the tax bills sued on to be issued except article 9 of the city charter of Kansas City. In and by the terms of said article 9 and by section 5 of said article 9 the cost of all paving on any street shall be charged as a special tax on the land on both sides of the street according to the frontage thereof. There is no other law authorizing or permitting said tax bills, except said article 9 of the city charter and said section 5 thereof. Said law is contrary to the Constitution of the United States and the 14th amendment thereof, and is void and of no effect. In and by said law the charter of
17 Kansas City and article 9 thereof, and by section 5 of said article 9, and by said ordinance, and by said contract, and by said tax bill the State of Missouri deprives defendants of their property without due process of law, contrary to and against the Constitution of the United States and the 14th amendment thereto, which said Constitution of the United States and the 14th amendment thereto defendants invoke as defense to this suit. The tax bill sued on, the ordinance, the contract for the work, and the city charter are all void and of no effect. Wherefore defendants ask for judgment in their favor and for costs.

Defendants, for a second and further defense to the first count in plaintiff's petition, say: Defendants were on July 17th, 1894, and still are the owners in fee and in possession of lot twelve (12), block H, in Ranson & Tally's addition, an addition to the city of Kansas, Missouri, against which the special tax bills sued on were issued. Defendants admit that Kansas City is a municipal corporation duly incorporated according to law. This defendant- admits that the plaintiff is a corporation duly organized under the laws of West Virginia, but defendants denies that plaintiff has complied with the

laws of Missouri with reference to foreign corporations doing business in Missouri. It has not and never had any authority to do business in Missouri. Defendants deni*e* that Kansas City, by its ordinance No. 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street," approved July 17th, 1894, provided for the paving of Forest avenue from Independence avenue to Twelfth (12th) street, in said city. The common council of Kansas City pretended to pass and in form passed an ordinance, No. 5891, and the mayor of Kansas City pretended to approve and in form approved an ordinance numbered as above, and said pretended ordinance provided as follows: That Forest avenue from Independence avenue to Twelfth (12th) street shall be
18 paved the full width thereof, exclusive of all sidewalks of legally established width, and of the spaces legally required to be paved by the street railway companies operating railways on said street. It was pretended to be enacted by said ordinance, and was in form enacted, that said pavement shall consist of a base of hydraulic cement concrete four inches in thickness; upon this is to be laid a binder of bituminous concrete 1½ inches in thickness, and upon the latter a wearing surface of 1½ inches, prepared from the best quality of pure Trinidad Lake asphalt, and that all of said work should conform in all respects to plans and specifications on file in the office of the city engineer, and defendant, aver that the plans and specifications so referred to in said ordinance and in the office of said engineer were and are a part of said pretended ordinance the same as if copied into it. In and by said pretended ordinance it was pretended to be enacted, and was in form enacted, that the work should be completed in sixty days from the time the contract therefor bound and took effect, and that the work should be paid for in special tax bills against and upon the lands that may be charged with the cost thereof according to law; that the passage of the ordinance and the doing of the work shall not render Kansas City liable to pay for such work or any part thereof, otherwise than by the issue of special tax bills.

Said ordinance pretended to enact, and in form enacted, that the contractor should do all work and furnish all material; that he should maintain and keep said pavement in a perfect state of repair for the period of five years from and after the completion and acceptance of the pavement; that the contractor should give bond with approved security to pay all laborers employed on the work, and to pay for all material used therein; that the contractor should give bond with approved security for the faithful and proper main-
tenance of the pavement for five years after such pavement
19 should be completed and finally accepted; that said bond for maintenance should provide that within ten days from due notice from the city engineer at any time the contractor should make good any fault or defect or failure in said pavement, and in the event of his failure to do so, then the city engineer might make or cause to be made such repairs and charge the same to said contractor and his sureties; and it was further provided that the tax bills were to be payable in installments, and the specifications referred to in said

pretended ordinance, and thereby made a part thereof, require the contractor to grade said street to a point seven inches below the then surface thereof, and to roll the ground with a five-ton roller, to excavate and fill up all soft and springy places and make a solid surface; on this rolled foundation shall be placed 4 inches of hydraulic cement concrete, and upon this a bituminous concrete 1½ inches thick, for a binder course, and upon this is required to be laid a wearing surface of Trinidad Lake asphalt cement, 12 to 15 per cent.; sand, 83 to 70 per cent., and pulverized carbonate of lime, 5 to 15 per cent; the gutters near to the curb to receive a coating of hot, pure asphalt. A line of granite or sandstone paving blocks not less than six inches in depth, five (5) to twelve (12) inches in length, and four (4) to seven (7) inches in thickness should be placed along the outside edge of all street railway tracks, and — said specifications so referred to in said ordinance and so made a part of said ordinance, as if copied into it, it was pretended to be provided, and was in form provided, that the contractor was to maintain and keep said pavement in a state of perfect repair for a period of five years from and after the completion and acceptance of the work and the issue of the tax bills to the satisfaction of the city engineer, and said contractor was to maintain and keep an office and agent in Kansas City, Missouri, for five (5) years from and after the date of the issue of
20 the tax bills, and on ten days' notice to this agent the contractor was to repair and make good any defects in said pavement which might occur from any cause at any time within five (5) years after the issue of the tax bills.

Said ordinance further provides that the tax bills were to be issued in installments and were to be issued on completion of the pavement and the price be bid by the contractor for grading the street to the proper depth, for rolling it and making it solid, for furnishing and putting on the concrete, and for the making of the binder course of bituminous concrete, and for making the wearing surface, for furnishing sandstone or granite paving blocks to be laid along the outside edge of the street railway tracks, and for maintaining and keeping said pavement in a state of perfect repair for a period of five (5) years after the completion of said pavement; the contractor was to bid for the entire work a sum not to exceed $2.57 per square yard, and the sum, not to exceed $2.57 per square yard of pavement to be laid, was to include the cost of all the work, labor and materials, and all grading and maintenance and repairs for five (5) years.

Kansas City had no power or authority to pass any ordinance which in whole or in part provided for maintaining and for keeping in perfect repair said street for five (5) years, and said Kansas City had no authority to issue tax bills in installments, and the tax bill sued on was issued under said ordinance as its authority, and is therefore null and void and of no effect, and within 60 days after issue of said pretended tax bill, viz., on the 13th day of December, 1894, defendants, being the owners of lot twelve (12), in block H, in Ranson & Tally's addition to Kansas City, Missouri, filed in the

office of the board of public works and city engineer in Kan
21 sas City, Mo., their objections to said tax bill, and they objected to the said tax bill on the ground that Kansas City had no authority to pass the ordinance No. 5891, entitled as aforesaid, and that said tax bills are void and without any authority to support them. Wherefore the defendants ask judgment in their favor and for costs.

Defendants, for a third and further defense to the first count in plaintiff's petition, say: Defendants are now and were at the time this suit was brought the owners in fee-simple and in possession of lot twelve (12), in block H, in Ranson & Tally's addition to Kansas City, Missouri, being the same lot mentioned in plaintiff's petition, and against which plaintiff seeks to enforce the special tax bill sued on in the first count of plaintiff's petition. Defendants admit that the plaintiff is a corporation, and that Kansas City is a municipal corporation existing under the laws of the State of Missouri. Defendants admit that Kansas City attempted to enact an ordinance No. 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street."

The common council of Kansas City attempted to pass and in form did pass and the mayor pretended to approve and in form did approve ordinance No. 5891, but said ordinance did not provide for the paving of Forest avenue from Independence avenue to Twelfth (12th) street, in said city. Said pretended ordinance was wholly null and void from want of authority in Kansas City to enact it.

There was no law authorizing said pretended ordinance. In and by the terms of said pretended ordinance No. 5891, it was pretended to be provided and was in form provided as follows: That Forest avenue from Independence avenue to Twelfth (12th) street should be paved the full width thereof, exclusive of sidewalks, with a pavement to consist of a base of hydraulic cement concrete four inches thick, upon this a binder course of bituminous concrete one
22 and one-half inches thick, and upon this a wearing surface one and one-half inches thick from the best quality of Trinidad Lake asphalt, and that the work embraced in said pretended ordinance should conform in all respects to plans and specifications in the office of the city engineer. It is further provided in said pretended ordinance that the contractor should, in addition to making said pavement, maintain and keep the same in a state of perfect repair for five years from and after the completion and acceptance of said pavement. Said pretended ordinance further provided that the total cost of doing all said work and furnishing all said material and maintaining said pavement in a state of perfect repair for five years from and after the completion of said pavement should not exceed the sum of two $\frac{57}{100}$ dollars per square yard for the surface paved. Said pretended ordinance required the contractor to enter into a contract to make the pavement and maintain and keep it in a state of perfect repair for five years after the completion and acceptance of the pavement without specifying how much was to be paid for maintaining and keeping in repair and how much was to be for original construction and materials and labor.

Neither Kansas City nor the common council of Kansas City had any authority to pass any ordinance to maintain and keep in repair said Forest avenue from Independence avenue to Twelfth (12th) street for a period of five years from the completion and acceptance of the pavement, and the mayor of Kansas City had no authority to approve such ordinance. It could only contract for two years for such purpose of maintaining and keeping in repair. Neither Kansas City nor the common council of Kansas City had any authority to pass the ordinance to pay for the work ordained in special tax bills payable in installments. Neither Kansas City nor the common council of Kansas City nor the mayor of Kansas City
23 had any authority to make out or deliver or issue special tax bills for maintenance and repairs for five years, or any other time, in advance of any repairs being made. Wherefore said ordinance was without any authority and contrary to and against the city charter, and therefore void and of no effect. Within sixty days after the issue of the said pretended tax bills sued on, defendants, being the owners of the lot against which the tax bill sued on was issued and charged and against which it is sought in the petition herein to enforce said special tax bill, filed with the board of public works a written statement of each and all objections to the tax bill sued on, which said statement in writing is in words and figures as follows, viz: Said statement sets up the same objections to the validity of said bills contained in this answer.

There was no other or further ordinance for doing said work or any part thereof. By reason of the facts alleged in this answer said ordinance was void and of no effect, and the tax bill sued on is *void* and of no effect.

Wherefore defendants ask judgment in their favor and for costs.

Defendants, for a fourth and further defense to the 1st count in plaintiff's petition, say defendants are now and have been for ten years prior to this time the owners in fee and in possession of lot twelve (12), in block H, in Ranson & Tally's addition to Kansas City, Missouri, being the lot against which the tax bill sued on in said count was issued. Said tax bill purports to be and was issued for work done and to be done and materials furnished and to be furnished under a contract between Kansas City, of the one part, and the plaintiff, The Barber Asphalt Paving Company, as principal, and Hugh J. McGowan and Joseph W. Mercer, as securities, of the other part. Said contract was void and of no effect. The ordinance
24 required all said work to be done in sixty days, but the contract provided that the engineer might extend the time for the completion of said work, and said contract thereby delegated to the city engineer the power to fix the time for the completion of said contract, all of which was void and rendered the whole contract void. Wherefore defendants ask judgment in their favor and for costs.

Defendants, for a fifth and further defense to the first count in plaintiff's petition, say they are now and have been for ten years last past the owners in fee and in possession of lot twelve, in block H, in Ranson & Tally's addition to the city of Kansas, now Kansas

City, Missouri, being the same lot against which the special tax bill sued on in the first count was issued.

Kansas City, of the one part, and the Barber Asphalt Paving Company, as principal, with Hugh J. McGowan and Joseph W. Mercer, as securities, of the other part, entered into a contract in writing, a copy of which is herewith filed, and in and by the terms of said contract agreed to by Kansas City and by this plaintiff plaintiff was to pave Forest avenue from Independence avenue to Twelfth street in the manner set out in said contract. The street was to be graded and the surplus material hauled away. A hydraulic cement concrete base of four inches in thickness was to be made, and upon this was to be placed a bituminous concrete 1½ inches thick, called a binder course, and upon this binder course was to be made and placed a wearing surface 1½ inches thick, and it was further agreed that the plaintiff was to maintain and keep in perfect repair said pavement for five years after the completion of the pavement and was to keep and maintain in Kansas City, Missouri, an office and an agent, and said plaintiff agreed, on notice being given it, to immediately repair and make good any defects in said pavement which may arise at any time during the five years next succeeding the issue of the tax bills. For doing said work and furnishing said material and for maintaining and keeping said
25–56 pavement in perfect repair for five years after its completion plaintiff was to receive payment in special tax bills only against and upon the adjoining and abutting real estate, and the tax bills were to be issued as soon as the pavement was completed, five years in advance of any repairs being made and five years in advance of any agent and office being selected and maintained, and for said work and material and for said maintenance and repairs and for maintaining and keeping in Kansas City an office and agent said Kansas City agreed to pay in special tax bills the sum of $2.57 per square yard for all the pavement laid, and said price included the cost of constructing said pavement, including all material and labor and the cost of maintaining and keeping the street in a state of perfect repair for five years after the completion of the pavement and the delivery of the tax bills, and said tax bills were to be delivered and made payable in installments. Kansas City had not and never had power to make the special tax bills payable in installments. There was no price agreed on for repairs, but the $2.57 per square yard included the cost of the original pavement and all repairs and maintenance. Kansas City had no power to make a contract to keep and maintain said pavement in a state of perfect repair for five years, and the price of construction is not separated or separable in said contract from the price to be paid for maintenance and repairs. Within sixty days after the issue of this tax bill defendants filed in the board of public works their objection, in writing, to said tax bills, and the objection thereto was that Kansas City had no power to make the contract for paving said street. Said contract exceeded its powers and was prohibited by the charter. Wherefore said tax bill is void and of no effect. Defendants ask judgment in their favor and for costs.

* * * * * * *

57 During the same term, on the 11th day of October, A. D. 1899, the following proceedings were had and made of record in the cause entitled—

BARBER ASPHALT PAVING CO. vs. MARGARET FRENCH ET AL. } 36276.

Defendants Oliver H. Dean, trustee for W. D. McLeod, and W. D. McLeod file joint and separate answer.

Said separate answer is in words and figures as follows, to wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City, October Term, 1899.

THE BARBER ASPHALT PAVING COMPANY, Plaintiff, vs. MARGARET FRENCH ET AL., Defendants. } No. 36276. Div. 2.

Separate Answer.

Now come the defendants Oliver H. Dean, trustee for W. D. McLeod, and W. D. McLeod, and for their joint and separate answer to plaintiff's petition and each and every count thereof deny each and every allegation, matter, and thing therein made or contained.

Wherefore said defendants pray for judgment and costs.

WARNER, DEAN & McLEOD,
Attorneys for said Defendants.

58 During the same term, on the 1st day of November, A. D. 1899, the following proceedings were had and made of record in the cause entitled—

BARBER ASPHALT PAVING CO. vs. MARGARET FRENCH. } 36276.

By agreement of parties a jury is waived herein.

During the same term, on the 9th day of December, A. D. 1899, the following proceedings were had and made of record in the cause entitled—

BARBER ASPHALT PAVING CO. vs. MARGARET FRENCH ET AL. } 36276.

Plaintiff files reply to answer of defendants Margaret French and Henry French.

Said reply is in words and figures as follows, to wit:

In the Circuit Court of Jackson County, Missouri, Sitting at Kansas City, October Term, 1899.

BARBER ASPHALT PAVING COMPANY, Plaintiff.
vs.
MARGARET FRENCH ET AL., Defendants. } No. 36276.

Reply.

Now comes the plaintiff and for its reply to the answer of the defendants Margaret French and Henry French in the above-entitled cause denies each and every allegation of new matter in each and every count of said answer contained. Plaintiff further states that the work or improvement of paving Forest avenue from Independence avenue to 12th street, for which the tax bill sued on in the above-entitled cause was issued in part payment of the cost of the said improvement, greatly enhanced the value of the real
59 estate described in plaintiff's petition, and that said real estate was specially benefited to an amount equal to and largely in excess of the cost of the improvement so assessed against said land, and that the cost and expense of the paving of said Forest avenue has been properly assessed and apportioned among the lots and lands benefitted thereby.

Wherefore plaintiff asks judgment as prayed for in its petition.

SCARRITT, GRIFFITH & JONES,
Attorneys for Plaintiff.

On the — day of the regular April term, A. D. 1900, the same being the 21st day of April, A. D. 1900, the following proceedings were had and made of record in the cause entitled—

THE BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
MARGARET FRENCH, HENRY FRENCH, Her Husband; Oliver H. Dean, Trustee for W. D. McLeod, and W. D. McLeod, Defendants. } No. 36276.

Judgment Entry.

Now, on this day, this cause coming on regularly to be heard, comes the plaintiff, by its attorneys, and the defendants Margaret French and Henry French, by their attorneys, and the defendants Oliver H. Dean, trustee for W. D. McLeod, and W. D. McLeod, though having been duly summoned, come not, but make default, and said defendants, Oliver H. Dean, trustee, and W. D. McLeod, by not appearing, are deemed to waive a jury, and, the plaintiff and other defendants hereinbefore mentioned having heretofore expressly waived a jury, this cause is submitted to the court upon the pleadings and the proofs, and the court, being fully advised in the premises, doth find the issues for the plaintiff, and finds that the plaintiff is en-
60 titled to recover of the defendants on the first count of plaintiff's petition the sum of one hundred and seventeen dollars

and thirty-five cents ($117.35), with interest thereon from the date hereof at the rate of ten (10) per cent. per annum, and have a lien for said sum upon the land hereinafter described.

And the court doth further find that the plaintiff is entitled to recover of the defendants on the second count of plaintiff's petition the sum of one hundred and seventeen dollars and thirty-five cents ($117.35), with interest thereon from the date hereof at the rate of ten (10) per cent. per annum, and have a lien for said sum upon the land hereinafter described.

And the court doth further find that the plaintiff is entitled to recover of the defendants on the third count of plaintiff's petition the sum of one hundred and seventeen dollars and thirty-five cents ($117.35), with interest thereon from the date hereof at the rate of ten (10) per cent. per annum, and have a lien for said sum upon the land hereinafter described.

And the court doth further find that the plaintiff is entitled to recover of the defendants on the fourth count of plaintiff's petition the sum of one hundred and seventeen dollars and thirty-five cents ($117.35), with interest thereon from the date hereof at the rate of ten (10) per cent. per annum, and have a lien for said sum upon the land hereinafter described.

Wherefore it is considered, ordered, and adjudged by the court that plaintiff have and recover of the defendants the full sum of four hundred and sixty-nine dollars and forty cents ($469.40), with interest thereon from the date hereof at the rate of ten (10) per cent. per annum, and the costs of this suit, to be made and levied of the following-described real estate, situate within the corporate limits of Kansas City, county of Jackson, State of Missouri, to wit, lot
61 twelve (12), block H, Ranson & Tally's addition to the city of Kansas, now Kansas City, Missouri, and that plaintiff have hereof special execution.

During the same term, on the 23rd day of April, A. D. 1900, the following proceedings were had and made of record in the cause entitled—

BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
MARGARET FRENCH ET AL., Defendants. } No. 36276.

Docket Entry.

Now, on this day, April 23rd, 1900, come the defendants Margaret French and Henry French and file their motion for a new trial herein; which motion is, by consent of parties, taken up and submitted to the court and by the court duly considered; thereupon the court doth overrule the same; to which action of the court the defendants at the time duly excepted; thereupon the said Margaret French and Henry French filed their motion in arrest of the judgment herein; which motion is, with the consent of the parties in the cause, taken up and submitted to the court, and the court, having duly considered the same, doth overrule the motion; to which action of the court the said defendants at the time duly excepted; there-

upon the said defendants tendered their bill of exceptions in this cause, which is by the court allowed and signed by the judge of this court and made a part of the record in this cause; and thereupon the said Margaret French and Henry French filed their bond and affidavit for appeal, which said bond is approved, and the said defendants are granted an appeal in this cause to the supreme court of Missouri.

62 Said bill of exceptions is in words and figures as follows, to wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City, October Term, 1899.

BARBER ASPHALT PAVING COMPANY, Plaintiff, vs. MARGARET FRENCH ET AL., Defendants. } No. 36276.

Be it remembered that on the 14th day of December, 1899, and at said October term of said circuit court, the above-entitled cause coming on to be heard before the court, Honorable James H. Slover, judge, presiding, plaintiff appearing by Messrs. Scarritt, Vaughn, Griffith & Jones, its attorneys, and defendants appearing by Messrs. Ess & Georgen and Leon Block, Esq., their attorneys, the following proceedings were had:

It was admitted and agreed that plaintiff had complied with the law of Missouri with reference to foreign corporations and is and was authorized to do business in this State at the time of the institution of this suit; that John Maloney was authorized by the board of public works of Kansas City, Missouri, by resolution duly passed, to sign the name of the president of said board to installment tax bills at the time the tax bills in suit were issued; that the signature to the tax bills sued on is that of Peter H. Tiernan, president of the board of public works of Kansas City, Missouri, signed by John Maloney under said authority.

Plaintiff, to sustain the issue on its part, then offered evidence as follows:

First. The tax bills sued on.

Which said tax bills were objected to by defendants for the reason that upon their face they are void, and there is no law in Missouri to support or enforce them.

63-65 The court overruled this objection; to which ruling defendants at the time duly excepted.

Said tax bills were then admitted in evidence, and are in words and figures as follows, to wit:

* * * * * * *

66 All of the lots abutting on that part of Troost avenue on which the said asphalt pavement was laid, as charged, are, it is admitted, of equal depth from said Forest avenue, and are similarly situated with reference to the said Forest avenue, and the lot here in question is improved and used as a residence property

These facts are admitted subject to the objection of defendants as to their competency and relevancy.

JOHN DONNELLY, called as a witness on the part of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. SCARRITT:

Q. Where do you reside?

A. Kansas City.

67 Q. What is your profession?

A. Civil engineer.

Q. How long have you followed that profession?

A. For about thirty-five years.

Q. What official positions have you held in this city?

A. I have been city engineer of Kansas City.

Q. For how long a time?

A. For about ten or twelve years at various times during the last twenty years.

Q. Are you acquainted with Forest avenue from Independence avenue to Twelfth street, and the lots fronting thereon?

A. I am.

Q. How long have you been familiar with that property?

A. Some thirty years.

Q. What is the distance from Independence avenue to Twelfth street?

A. A half mile by the Government survey; a little more than that in fact.

Q. State to the court how the land abutting on the street is subdivided, with reference to Forest avenue and the other improvements.

A. In the platting the lots were all given a frontage on Forest avenue, except at Twelfth street, running back a depth of 150 feet to an alley. In the improvements put up ten years ago the improvements were all made with reference to the frontage on Forest avenue and access to the rear.

Q. State whether all of the lots were platted of equal depth.

A. Yes, sir; those that fronted on the street from the alley south of Twelfth street to Independence avenue.

Q. Have you noted the effect of street paving upon adjacent property during the time of your residence in Kansas City?

A. I have.

Q. You may state to the court whether or not in your opinion all of the lots and lands abutting on Forest avenue, in this city, from Independence avenue to Twelfth street, were specially benefitted by the paving of that street with asphalt in the year 1894, and referred to in the pleadings in this case.

68 Objected to by defendants as incompetent, irrelevant, and immaterial. Objection overruled.

To this ruling of the court defendants at the time duly excepted.

A. The property was benefitted by the laying of that pavement.

Mr. Ess: We object to the answer and move to strike it out because there must be a special benefit.

The COURT: Perhaps it was not responsive.

Q. I ask you whether it was specially benefitted thereby.

A. This land was all specially benefitted by the putting down of the pavement.

Q. Tell the court your opinion as to the ratio the several lots or tracts of land abutting on the improvement share in such special benefits.

Objected to by defendants as incompetent, irrelevant, and immaterial, because, whether a lot is benefitted in a greater or less proportion, this court has no power to change the amount of the tax bill.

The COURT: I think it is better to let the upper court get all the information it can. There is no jury here, and I will hear it.

To this ruling of the court defendants at the time duly excepted.

A. I think the ratio of benefit of that pavement sustained by each lot was in proportion to the frontage of the lot.

Q. Do you remember what Forest avenue is called on the recorded plat?

A. Elizabeth street, is my recollection. I have not looked at the plat for some time.

Cross-examination waived.

69 W. S. WOODS, called as a witness on the part of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. SCARRITT:

Q. How long have you resided in this vicinity?

A. About twenty-three years.

Q. What is your business?

A. Real estate.

Q. How long have you followed that business?

A. About ten years.

Q. Are you acquainted with the value of the property in Kansas City and have you an opinion as to the effect of street improvements on the value of abutting lands?

A. Yes, sir; I know the effect of such improvements.

Q. Are you acquainted with Forest avenue from Independence avenue to Twelfth street? And, if so, state how long you have known it.

A. I have known the street for twenty-three years, or since 1876.

Q. State the general character of the property and the general character of the improvements on the street.

A. Well, Forest avenue has always been looked upon as a nice residence street from the time I came here, twenty-three years ago, up to the present time.

Q. Has it preserved the character of a residence street during all of that time?

A. It has; yes, sir.

Q. You may state whether or not the putting of an asphalt pavement on that part of Forest avenue I have referred to, in the year 1894, as described in the answer in this case, was a special benefit to the several lots or tracts of land abutting upon that part of Forest avenue.

Objected to by defendants as incompetent, irrelevant, and immaterial for the same reasons given before. Objection overruled.
70 To this ruling of the court defendants at the time duly excepted.

A. I think the street has been benefitted by the asphalt pavement.

Q. Do you think the abutting property has been specially benefitted?

A. I do.

Q. To what extent have each of the lots, in your opinion, been specially benefitted?

Objected to by defendants as incompetent, irrelevant, and immaterial, and because he cannot determine that. Objection overruled.
To this ruling of the court defendants at the time duly excepted.

A. Well, if I was asked to place a value on the property before the paving and after the paving, I would say the improvement on the street has benefitted all of the abutting property from eight to twelve dollars a foot, at the least calculation; that is my judgment in asphalt paving matters where property is located as this is.

Q. Do you know how the land abutting on that street or that part of the street described as subdivided—how the lots have been improved with reference to the street?

Objected to by defendants as incompetent, irrelevant, and immaterial. Objection overruled.
To this ruling of the court defendants at the time duly excepted.

A. If I understand the question, you want to know how the lots have been laid out with reference to the street?

Q. Yes.

A. With the exception of the frontage on Twelfth street, and perhaps, I won't say positively, as to Independence avenue, the lots all front on Forest avenue, which runs north and south.

71 Q. State, if you please, what is your opinion of the ratio of the special benefits sustained by each lot or tract of land abutting on that improvement, compared with one another, by reason of that improvement.

Objected to by defendants as incompetent, irrelevant, and immaterial for the reasons already stated, and because the question calls for a construction of the law. Objection overruled.
To this ruling of the court defendants at the time duly excepted.

Q. If I understand your question correctly, I would say the lots would be benefitted in proportion to their size. For instance, if you

have a twenty-five-foot lot and a fifty-foot lot, the latter would be doubly benefitted as compared with the former.

Q. When you say they are benefitted according to their size you mean to refer to their frontage?

A. Yes, sir; to the frontage on Forest avenue.

Q. Do you mean the frontage of each lot?

A. Yes, sir.

Cross-examination waived.

E. H. PHELPS, called as a witness on the part of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. SCARRITT:

Q. Where do you reside?

A. Kansas City, Missouri.

Q. How long have you lived here?

A. Nearly eighteen years.

Q. What is your business?

A. Real estate.

Q. How long have you been in that business?

A. Nearly eighteen years in this city.

Q. You have had quite a large experience in buying and selling property here and know the effect upon the value of lands which results from the paving of streets?

A. Yes, sir; I think so.

Q. You have been on numerous condemnation juries where benefits and damages have been passed upon?

A. I have.

72 Q. How long have you been acquainted with Forest avenue and the property abutting thereon from Independence avenue to Twelfth street?

A. Nearly eighteen years.

Q. State, if you please, whether or not the paving of that street with an asphalt pavement in 1894, described in the answer in this case, conferred a special benefit upon the several lots and tracts of land abutting thereon.

Objected to by defendants as incompetent, irrelevant, and immaterial for the reasons already stated. Objection overruled.

To this ruling of the court defendants at the time duly excepted.

A. I think it did and it does.

Q. State, if you please, the extent of that special benefit.

Objected to by defendants as incompetent, irrelevant, and immaterial for the reasons already stated. Objection overruled.

To this ruling of the court defendants at the time duly excepted.

A. O, it is benefitted to the extent of the cost of the paving and probably more; perhaps in the case you speak of I might say twenty per cent.

Q. You refer to Forest avenue?

A. Yes, sir.

Q. Do I understand you to say that in your opinion every tract of land on that street within the limits designated is specially benefitted?

Objected to by defendants as incompetent, irrelevant, and immaterial for the reasons stated. Objection overruled.

To this ruling of the court defendants at the time duly excepted.

A. Yes, sir.

Q. State the ratio of benefit which in your opinion each of the several lots or tracts of land bears to the whole benefit—I mean each tract abutting on the improvement.

73 Objected to by defendants as incompetent, irrelevant, and immaterial for the reasons already stated. Objection overruled.

To this ruling of the court defendants at the time duly excepted.

A. The ratio is in proportion to the frontage on the street.

Cross-examination waived.

JOHN STEVENS, called as a witness on the part of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. SCARRITT:

Q. How long have you resided in this city?

A. Fourteen years.

Q. What is your business?

A. Real estate.

Q. How long have you followed that business?

A. Fourteen years.

Q. Are you familiar with the values of lands in Kansas City and with the effect upon such values which is occasioned by reason of the paving of a street upon which the lots abut?

A. Yes, sir.

Q. How long have you been familiar with Forest avenue from Independence avenue to Twelfth street?

A. For fourteen years.

Q. That is one of the good, substantial residence streets of this city?

A. Yes, sir; one of the best.

Q. State whether or not the construction of an asphalt pavement on that street in the year 1894, as described in the defendants' answer in this case, specially benefitted each lot and tract of land abutting on the improvement.

Objected to by defendants as incompetent, irrelevant, and immaterial for the reasons already stated.

The court overruled the objection; to which ruling defendants at the time duly excepted.

A. Yes, sir; it did.

Q. To what extent?

Objected to by defendants as incompetent, irrelevant, and immaterial for the reasons already stated. Objection overruled.
74–79 To this ruling of the court defendants at the time duly excepted.

A. Well, more than the cost of the improvement, certainly.

Q. State what ratio of benefit is sustained by each tract of land abutting on the improvement with reference to the other tracts of land abutting on the street.

Objected to by defendants as incompetent, irrelevant, and immaterial for the reasons already stated. Objection overruled.
To this ruling of the court defendants at the time duly excepted.

A. I think they were all benefitted alike—that is, according to their frontage.

Cross-examination by Mr. Ess:

Q. A hole is benefitted just as much as a nice lying lot?

A. I do not know of any lots which may be termed "holes" on Forest avenue.

Q. Well, generally they are benefitted as much?

A. That depends on circumstances.

Q. Well, are they in all cases benefitted alike—the hole being benefitted equally with a nice level lot?

A. O, there might be a condition of things where a lot would be forty or fifty feet below the grade of the street and the property worthless. In that case it would not be so much benefit, but in all good property, like Forest avenue or better streets, I think it is greatly benefitted by the paving.

Plaintiff next offered in evidence article 2 of the Revised Ordinances of Kansas City, 1888; also article 6 of the Revised Ordinances of Kansas City, 1898, which are as follows:

80 * * * * * * *

Plaintiff here rested its case, and thereupon defendants, to sustain the issue on their part, offered evidence as follows, to wit:

An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street.

Be it ordained by the common council of Kansas City:

SECTION 1. That Forest avenue from Independence avenue
81 to Twelfth (12th) street shall be paved the full width thereof, exclusive of all sidewalks of legally established widths, and of the spaces legally required to be paved by the street railway companies operating street railways across said avenue.

SEC. 2. The pavement shall consist of a base hydraulic cement concrete, four (4) inches in thickness; upon this a binder of bituminous concrete, one and one-half (1½) inches; a wearing surface of one and one-half (1½) inches in thickness prepared from the best

quality of pure Trinidad Lake asphalt, and shall conform in all respects to plans and specifications on file in the office of the city engineer.

SECTION 3. The work shall be completed within sixty (60) days from the time a contract therefor binds and takes effect, and shall be paid for in special tax bills against and upon the lands that may be charged with the cost thereof, according to law. Which work the common council deems it necessary to have done. And the common council finds and declares that the resolution declaring the work and improvements herein mentioned to be necessary, stating the kind of paving material proposed to be used, as provided by section 2 of article IX of the charter of said city, has been published as therein required, and that the resident owners of said city who own a majority in front feet of all the lands belonging to such residents fronting on said part of the avenue aforesaid, to be improved, have not filed with the city clerk a remonstrance against the doing of such work, or a petition for the making of such improvement with a different kind of material or in a different manner from that specified in such resolution. And the passage of this ordinance, and the doing of said work shall not render Kansas City liable to pay for such work, or any part thereof, otherwise than by the issue of special tax bills.

SEC. 4. The total cost of the work herein authorized shall
82 not exceed the sum of two and fifty-seven one-hundredths (2.57) dollars per square yard, and said work shall be executed with a guarantee to maintain and keep the same in a state of perfect repair for a period of five (5) years from and after the completion and acceptance of the same, without further compensation than that provided for in the contract for the first cost of the same, and for which the said special tax bills are issued.

SEC. 5. In addition to sufficient bond guaranteeing the payment of all laborers employed on the work, and for all material used therein, a separate bond shall be executed to Kansas City guaranteeing the faithful and proper maintenance of the pavement for five (5) years after such pavement is completed and finally accepted, which bond shall be in the sum determined by the city engineer, secured with at least two (2) good and sufficient securities approved by the city comptroller, and shall provided that within ten (10) days from due notice from the city engineer the contractors or sureties they will repair and make good to the satisfaction of said city engineer any default, defect or failure in said pavement; and in case the said contractor, or sureties, shall fail to make such repairs, the city engineer shall execute the same and charge the cost to said contractors and sureties. The form of such bond shall be approved by the city counselor.

SEC. 6. The special tax bills to be issued for the work and improvement herein provided for shall be made payable in four (4) equal installments, payable and collectible and in all respects in compliance with the provisions of section 23 of article IX of the charter of said city.

SEC. 7. All ordinances or parts of ordinances in conflict with this

ordinance are, in so much as they may conflict with this ordinance, hereby repealed.

83 Passed Jul- 13, 1894. Passed Jul- 13, 1894.
WM. T. JAMISON, PETER H. TIERNAN,
Speaker, Lower House of the Common Council. *President, Upper House of the Common Council.*

Approved July 17th, 1894.
WEBSTER DAVIS, *Mayor.*

Attest:
[SEAL.] F. G. GRAHAM, *City Clerk.*

No. 2450.

Board of public works.

KANSAS CITY, MISSOURI, *July* 10, 1894.

To the honorable common council of Kansas City:

The board of public works in pursuance of the provisions of section 2 of article IX of the charter of Kansas City, Missouri, recommends that this ordinance do pass, and that the improvements therein mentioned be made.

By order of the board of public works.
PETER H. TIERNAN, *President.*

Attest:
[SEAL.] H. P. LANGWORTHY, *Secretary.*

Defendant- also offered in evidence the contract for the paving of the street in question, together with the specifications for the doing of the work and the bond for its faithful performance; which said documentary evidence is as follows, to wit:

Approximate estimate, 10,961 sq. yds.

KANSAS CITY.

1894.

Contract and Specifications for Constructing Asphalt Pavement on Forest Avenue from Independence Avenue to Twelfth (12th) Street.

This contract, made and entered into this 31st day of July, 1894, by and between the Barber Asphalt Paving Company, as principal, and party of the first part, and Hugh J. McGowan and Joseph
84–89 W. Mercer, as securities, parties of the second part, and Kansas City, party of the third part, witnesseth:

That whereas the said party of the first part is the lowest bidder, for making, under provisions of ordinance No. 5891, entitled, "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street," approved July 17th, 1894, the following city improvements, viz: Constructing and maintaining for a period of five (5) years an asphalt pavement on Forest avenue from Inde-

pendence avenue to Twelfth (12th) street, for the full width thereof exclusive of all sidewalks of legally established widths, and of the spaces legally required to be paved by the street railway company operating the street railways across the said avenue. The pavement shall consist of a wearing surface of Trinidad Lake asphalt not less than one and one-half (1½) inches in thickness upon an undercourse of bituminous concrete one and one-half (1½) inches in thickness, laid upon a foundation of hydraulic cement concrete not less than four (4) inches in thickness, the work to be done according to the specifications herein contained.

Now, therefore, the said party of the first part does hereby agree and bind himself, his heirs, executors and assigns, to furnish all the material and do all the work necessary to perform the work above mentioned, according to the terms of said ordinance No. 5891, and the directions of the city engineer, and in conformity to the specifications hereinafter contained and made a part of this contract, and to the satisfaction and acceptance of the city engineer of Kansas City, and to maintain the same in a state of perfect repair for a period of five (5) years from and after its final completion and acceptance.

Specifications for Constructing and Maintaining for a Period of Five (5) *Years an Asphalt Pavement on Forest Avenue, from Independence Avenue to Twelfth* (12*th*).

* * * * * * *

90 Foundation.

Hydraulic cement concrete.

On a subgrade as above prepared there shall be placed a layer of hydraulic cement concrete of not less than four (4) inches in thickness when tamped. The concrete to be formed and placed as follows:

Proportions.

The concrete shall be composed of one (1) part of hydraulic cement, two (2) parts of sand, and five (5) parts of broken stone; these proportions to be established by measurement.

Cement.

The cement shall be fresh, fine ground, hydraulic cement and capable of withstanding a tensile strain of thirty-five (35) pounds per square inch, when mixed pure and after an exposure of thirty (30) minutes in the air and twenty-four (24) hours in water. The cement shall be tested and accepted by the engineer. The contractor shall provide dry storage for the cement, and any condemned cement, or any which may become damaged, shall be immediately removed from the work.

Sand.

The sand shall be clean, coarse, sharp river sand, free from loam or dirt, and shall be screened when deemed necessary by the engineer.

Stone.

The stone shall be hard ledge limestone, broken so as not to exceed two and one-half (2½) inches in their greatest dimensions. They shall be clean, free from duct or dirt, and shall be wet before being used.

91 Mixing and laying.

The concrete shall be prepared in suitable boxes and shall be formed by first thoroughly mixing the proper proportions of cement and sand together dry, to which only a sufficient amount of clean water shall be added to produce a mortar of proper consistence when thoroughly worked. To this fresh mortar the proper proportion of wet stone shall be added, and the mortar and stone quickly and thoroughly mixed until each stone is completely covered with mortar. The concrete shall be promptly deposited in place, without scattering, and then rammed until the mortar flushes to the surface, which surface shall conform to a plane parallel with and four (4) inches below the finished surface of the pavement. The concrete shall be properly protected until, in the opinion of the engineer it is sufficiently set, and not until such time shall the pavement be laid thereon. Concrete shall not be laid when the temperature is such as, in the opinion of the engineer, would injure the quality of the concrete.

The concrete shall extent close up to all openings, projections, or irregularities, and be finished about the same in a neat and workmanlike manner.

Between the curb lines and any intersecting street or alley the concrete and pavement shall be finished against a white-oak plank three inches (3) thick, twelve (12) inches deep and of such length as the engineer may designate. The upper edges of the plank to be neatly adzed off to conform to the finished surface of the pavement.

When the work joins any pavement already laid the engineer may require the contractor to remove and relay a sufficient amount of the old pavement to form a satisfactory connection of the two pavements.

92 Binder course.

Bituminous concrete.

Upon the base of hydraulic cement concrete there shall be spread a binder course of bituminous concrete composed of clean broken stone not exceeding — and one-half (1½) inches in their greatest dimensions, and an asphalt cement made as hereinafter specified, the parts to be thoroughly heated and then mixed by machinery in the proportions of not less than fifteen gallons of asphaltic cement to one cubic yard of broken stone.

The mixture shall be spread upon the base with hot irons and rakes and while in a hot and plastic condition shall be rammed and rolled until its forms a compact and thoroughly bonded binder course of a thickness of not less than one and one-half (1½) inches

with an even and uniform surface parallel with and — one-half (1½) inches below the completed surface of the pavement.

Wearing surface.

Upon the foundation thus prepared there shall be placed an asphalt wearing surface of not less than one and one-half (1½) inches in thickness when thoroughly compressed, which shall be manufactured and laid as follows:

The wearing surface shall be composed of:

1st. Refined Trinidad Lake asphaltum.

2nd. Heavy petroleum oil.

3rd. Clean, fine, sand.

4th. Pulverized carbonate of lime.

Samples of any of the materials named, or any of the mixtures made therefrom, shall be furnished the city engineer when required, and he shall also have access to all branches to the work at any time.

Asphaltic cement.

An asphaltic cement shall be prepared by melting and mixing acceptable quantities of refined asphaltum and heavy petro-
93 leum oil in the proportions, by weight, of one hundred (100) parts of pure asphalt to fifteen (15) to twenty (20) parts heavy petroleum oil.

Pavement mixture.

The asphalt wearing surface shall be formed by mixing the materials as above specified in the following proportions:

Asphaltic cement—From twelve (12) to fifteen (15) per cent.

Sand—From eighty-three (83) to seventy (70) per cent.

Pulverized carbonate of lime—From five (5) to fifteen (15) per cent.

The mixture shall be effect- as follows: The asphalt cement and sand shall be heated separately to about three hundred (300) degrees Fa-renheit. The pulverized carbonate of ilme, while cold, shall be mixed with the hot sand in the required proportions, and to this mixture sufficient asphaltic cement, at the required temperature, shall be added, to effect a thoroughly homogeneous mixture.

Manner of laying.

The pavement mixture thus prepared shall be delivered upon the street at a temperature of not less than two hundred and fifty degrees Fa-renheit. It shall then be quickly spread by means of hot iron rakes in such manner as to insure an even and uniform surface, and to such depth that after having received its ultimate compression it shall have a thickness of not less than one and one-half (1½) inches.

The pavement shall be ironed and rolled by hand, after which a small amount of hydraulic cement shall be swept over it, and it will then be thoroughly compressed with a steam roller, the rolling to continue as long as it makes an impression on the surface.

The gutters for a width of twelve inches next the curb shall receive a coating of hot pure asphalt.

There shall be laid along the outside edge of all street railway tracks a line of granite or sandstone paving blocks, not less
94 than six inches in depth, five to twelve inches in length and four to seven inches in thickness.

* * * * * * *

95 & 96 *General Stipulations.*

It is further expressly agreed between the parties hereto that this contract is made subject to the conditions and stipulations which follows:

* * * * * * *

97 10. It is further agreed that the passage of the ordinances hereinbefore referred to, and the doing of the work embraced in this contract without any proper petition to the common
98 council from the real-estate owners to have said work done, shall not render the city liable to pay directly or indirectly for such work, or any part thereof, otherwise than by the issue of special tax bills, and the said first party shall assume all risks as to the validity of such special tax bills and take the same without recourse against Kansas City in any event.

* * * * * * *

15. In consideration of the completion by the said first party of all the work embraced in this contract in conformity with the specifications and stipulations herein contained, Kansas City, party of the third part, hereby agrees to pay to the said first party at the following rate per square yard, viz:

The sum of two (2) dollars and fifty-seven (57) cents.

And the said party of the first part further agrees that he will not be entitled to receive payment for any portion of the afore-
99 said work or materials until the same shall have been fully completed in the manner set forth in this agreement to the satisfaction and acceptance of the city engineer. And that he will then receive pay according to the above schedule of prices, in special tax bills against and upon the lands liable to be charged with the cost thereof, as provided by law, according to the charter and ordinances of said city, and that his receipt therefor shall be in full of all claims against Kansas City on account of said work.

In accordance with the ordinance, for the work herein specified, it is hereby agreed that the special tax bills issued in payment of such work shall be made payable in four (4) equal installments, payable and collectible in the manner provided for in section twenty-three (23) article nine (9) of the charter of Kansas City.

Said parties of the second part hereby guarantee that the said party of the first part will well and truly perform the covenants hereinbefore contained to pay for the work and labor of all laborers and teamsters, teams and wagons, employed on the work, and for all materials used therein, and if the cost of such work and labor

and materials is not paid in full by the said party of the first part, then the said parties of the second part hereby agree to pay for said work, labor and materials, or any part thereof, which shall not be paid by said first party, within ten (10) days after the money for such work, labor and materials becomes due and payable, and this provision shall entitle any and all laborers and teamsters, and owners of teams and wagons, who may do work, and parties who may furnish materials on or for the improvements to be done under this contract, to sue and recover from said second parties, or either of them, the amount due or unpaid to them, or either of them, by said first party; but said second parties shall not be liable on this guarantee on account of the materials used and labor done upon said work beyond the sum of twelve thousand dollars ($12,000)
100 the estimated cost of materials used and labor done upon said work.

The said parties of the second part hereby agree with Kansas City that the said party of the first part will well and faithfully perform each and all of the terms and stipulations in the foregoing contract, to be done, kept and performed on the part of the said first party, but said parties of the second part shall not be liable hereon beyond the sum of —.

In witness whereof, the said parties of the first and second parts have hereunto set their hands and seals respectively, and Kansas City executes this contract by her city engineer.

THE BARBER ASPHALT PAVING COMPANY,
By HENRY R. KASSON,
Attorney-in-fact. [L. S.]
J. W. MERCER. [SEAL.]
KANSAS CITY,
By H. H. FILLEY, *Engineer Thereof.* [SEAL.]

CITY COMPTROLLER'S OFFICE,
KANSAS CITY, MO., *Aug.* 6, 1894.

The sureties and bond aforesaid are hereby approved as sufficient.

JOHN F. SHANNON,
City Comptroller.

CITY COUNSELOR'S OFFICE,
KANSAS CITY, MO., *Aug.* 6, 1894.

The foregoing contract and bond are in due form according to law and are hereby approved.

F. F. ROZELLE,
City Counselor.

CITY CLERK'S OFFICE,
KANSAS CITY, MO., 8, 6, 1894.

The foregoing contract and bond have been this day confirmed by the common council of Kansas City.

Attest: F. G. GRAHAM, *City Clerk.*

101 The plans referred to in and made a part of the foregoing contract indicate that the roadway of Forest avenue to be paved has a uniform width of thirty-six (36) feet, and that the structure of the pavement along the entire extent of the roadway is uniform in character and quantity.

* * * * * * *

102 The foregoing was all the evidence offered in the case. The defendants asked the following declarations of law, viz:

1.

Under the pleadings and evidence plaintiff cannot recover.

2.

The ordinance No. 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth street," approved July 17th, 1894, is contrary to and against the charter of Kansas City, and is therefore null and void, and verdict must be for the defendants.

103 3.

The contract offered in evidence for paving Forest avenue is invalid and void and without any authority in Kansas City or her mayor and common council to enact the same.

4.

The contract offered in evidence and read in evidence is a contract to construct the pavement and maintain and keep the street in repair for five years, and is contrary to the charter of Kansas City, and forbidden by it, and is void and of no effect, and your verdict and finding must be for the defendants.

5.

The tax bills sued on are without any authority of any law of this State or of the United States, and are therefore null and void.

6.

The charter of Kansas City purports to authorize the paving of streets and to authorize special tax bills therefor, charging the cost thereof on the abutting property according to the frontage, without reference to any benefits to the property on which the charge is made and the special tax bill levied, and said charter purports to authorize the levy of said special tax notwithstanding the fact that the work for which it is done is a damage to the property and destroys its value.

The law is contrary to and in violation of the fourteenth amendment to the Constitution of the United States.

Said cause was by the court taken under advisement, and on the 21st day of April, 1900, and during said April term of said circuit court, the court refused to give each of said declarations of law asked by the defendants, and to this action, order, and ruling of the

court in refusing to give said declarations of law, and to give each of them, defendants at the time duly excepted, and thereupon the court found the issues for plaintiff; to which action of the
104 court defendant- then and there excepted, and within four days thereafter, on April 23rd, 1900, defendants filed their motion for a new trial *is* in the words and figures following, viz:

In the Circuit Court of Jackson County, Missouri, Sitting at Kansas City, April Term, 1900.

BARBER ASPHALT PAVING COMPANY
vs.
HENRY N. ESS ET AL.

Motion for New Trial.

Now come the defendants and move the court to set aside the judgment rendered by the court in the above-entitled cause and grant the defendants a new trial of said cause for the following reasons, to wit:

1. Because the judgment is against the law.
2. Because the judgment is against the evidence.
3. Because the judgment is against the law and the evidence.
4. Because the court erred in excluding relevant, competent, and legal evidence offered by the defendants.
5. Because the court erred in admitting incompetent, irrelevant, and illegal evidence on behalf of the plaintiff against the objection of the defendants.
6. Because the court erred in refusing to give each and every one of the instructions asked by the defendants.
7. Because the judgment is otherwise erroneous, illegal, defective, and contrary to law.
8. Because the court erred in not rendering judgment in favor of the defendants and against the plaintiff.

HENRY N. ESS,
Attorney for Defendants.

105 Which said motion, being by consent submitted to the court and argued by counsel, was overruled; to which ruling of the court in overruling said motion for a new trial defendants then and there excepted.

Whereupon defendants on April 23d, 1900, within four days after judgment, filed their motion in arrest of judgment; which said motion is in words and figures following, viz:

In the Circuit Court of Jackson County, Missouri, Sitting at Kansas City, April Term, 1900.

BARBER ASPHALT PAVING COMPANY, Plaintiff,
vs.
——— ———.

Motion in Arrest of Judgment.

Now come the defendants in the above-entitled cause and move the court to set aside and arrest the judgment rendered herein for the following reasons, to wit:

1. Because the judgment upon the record is erroneous.
2. Because the judgment is in favor of the plaintiff, whereas under the pleadings and evidence the same should have been in favor of the defendants.
3. Because the plaintiff's petition does not state facts sufficient to constitute a cause of action against the defendants.
4. Because the judgment is otherwise erroneous, illegal, defective, and contrary to law.

HENRY N. ESS,
Attorney for Defendants.

Which said motion was by the court taken up on its filing, argued, and submitted to the court. The court thereupon overruled the same; to which ruling of the court defendants then and there excepted.

106 & 107 And thereupon, on this 23rd day of April, 1900 the defendants, after the foregoing proceedings were had, presented to the court this their bill of exceptions in this cause; which said bill of exceptions is by the court here allowed and signed, sealed, and made a part of the record, and it is done accordingly.

J. H. SLOVER,
Judge of Division No. 2 of the Circuit Court of Jackson County, Missouri.

* * * * * * *

108 STATE OF MISSOURI, } *ss:*
County of Jackson, }

I, H. M. Stonestreet, clerk of the circuit court of Jackson county, State of Missouri, do hereby certify that the foregoing is a full, true, and complete transcript of all proceedings in the cause wherein Barber Asphalt Paving Company is plaintiff and Margaret French *et al.* are defendants, as fully as the same appears of record and
109 on file in my office, and the copy of the bill of exceptions as furnished by stenographer is inserted herein.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, in Kansas City, Missouri, this 21st day of April, A. D. 1900.

[SEAL.]

H. M. STONESTREET, *Clerk,*
By H. D. PAYNE, *D. C.*

And afterwards, to wit, on the 27th day of April, 1900, the following proceedings were had in said cause, viz:

BARBER ASPHALT PAVING CO., Resp.,
vs.
MARGARET FRENCH ET AL., App.

Come now the said parties, by attorneys, and after argument herein submit this cause to the court.

And afterwards, to wit, on the 13th day of November, 1900, the further following proceedings were had in said cause, viz:

BARBER ASPHALT PAVING COMPANY, Respondent,
vs.
MARGARET FRENCH and HENRY FRENCH, Her Husband; Oliver H. Dean, Trustee for W. D. McLeod, and W. D. McLeod, Appellants.
Appeal from Jackson County Circuit Court.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid in form aforesaid by the said Jackson county circuit court rendered be in all things affirmed and stand in full force and effect, and that the said respondent recover against the said appellants its costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to wit:

In the Supreme Court of Missouri, in Banc, April Term, 1900.

BARBER ASPHALT PAVING COMPANY, Respondent,
vs.
MARGARET FRENCH ET AL., Appellants.

110 This suit was instituted in the circuit court of Jackson county, returnable to the October —, 1899, thereof, for the purpose of enforcing the lien of a tax bill issued by Kansas City in part payment of the cost of paving Forest avenue from Independence avenue to Twelfth street with an asphalt pavement. The petition is in the usual form. The defenses relied upon by the defendants, although stated in several different forms, may be resolved into two contentions:

First. That the requirement of the ordinance and contract providing for the work in respect to the guarantee thereof for five years is *ultra vires* on the part of the city and void, and—

Second. That the method of apportioning and charging the cost of the pavement violates the limitation of the Federal Constitution that no State shall deprive any person of his property without due process of law.

The work done consisted of paving with asphaltum the roadway

of Forest avenue in the said city, thirty-six (36) feet in width, from Independence avenue to Twelfth street, a distance of one-half of a mile. Forest avenue is one of the oldest and best improved residence streets in Kansas City, and all of the lots abutting thereon front the street and extend back therefrom uniformily to the depth of an ordinary city lot to an alley. The lots are all improved and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarly situated with respect to the asphalt pavement. The structure of the pavement along its entire extent is uniform in character and quality. There is no showing that there is any difference in the value of any of the lots abutting upon the improvement. The evidence of four witnesses was taken, each of whom testified that each and every lot fronting on that part of the street improved was specially benefitted to an amount exceeding the cost of the pavement, and that each of the several lots abutting upon the improvement shared the total benefit sus-
111 tained by all such lots in the proportion of the frontage of each lot thereon to the total frontage on the improvement of all such lots.

This paving procedure was inaugurated conformably to the requirements of the Kansas City charter by the adoption of a resolution by the common council of this city declaring the work of paving the street to a stated extent, and with a pavement of a defined character, to be necessary, which resolution was first recommended by the board of public works of the city. This resolution was thereupon published for ten days in the newspaper doing the city printing. Thereafter the resident owners of the city, owning a majority of front feet of lands belonging to such residents and fronting on that part of the street to be improved, had the right within thirty days after the first day of the publication of the resolution to file a remonstrance with the city clerk against the proposed improvement, and thereby to divest the common council of the power to make the improvement, and such property-owners had the right, by filing within the same period a petition so to do, to have such street improved with a different kind of material or in a different manner from that specified in such resolution. In this proceeding neither such a remonstrance nor petition was filed, and the common council, upon the recommendation of the board of public works, enacted an ordinance numbered 5891, requiring the construction of the pavement. The charter requires that a contract for such work shall be let to the lowest and best bidder. Thereupon bids for the work were duly advertised for, and, the plaintiff being the lowest and best bidder therefor, a contract was, on the 31st day of July, 1894, entered into between Kansas City and the plaintiff for the construction of said pavement.

The contract expressly provides that the work shall be paid for by the issuance of special tax bills, according to the provisions of the Kansas City charter, and that the city shall not in any event be liable for or on account of the work. The cost of the pavement was apportioned and charged against the lots fronting thereon
112 according to the method prescribed by the charter, which is that the total cost of the work shall be apportioned and

charged against the lands abutting thereon according to the frontage of the several lots or tracts of land abutting upon the improvement. The charge against each tract of land is evidenced by a tax bill. The tax bill representing the assessment against each lot is, by the charter, made a lien upon the tract of land against which it is issued and is *prima facie* evidence of the validity of the charge represented by it. Such lien can be enforced only by suit in a court of competent jurisdiction against the owners of the land charged. No personal judgment is authorized to be rendered against the owner of the land. The right is expressly conferred on the owner of reducing the account of the recovery by pleading and proving any mistake or error in the amount of the bill or that the work was not done in a good and workmanlike manner.

The judgment was for the plaintiff for the amount due on the bill and for the enforcement of his lien, from which defendants, having unsuccessfully moved for a new trial and in arrest of judgment, have appealed.

Prior to the decision of the Supreme Court in Norwood *vs.* Baker, 172 U. S., 269, the method adopted in the charter and ordinance of Kansas City of charging the cost of paving Forest avenue against the adjoining lots according to their frontage had been repeatedly authorized by the legislature of Missouri, and such laws had received the sanction of this court in many decisions. St. Louis *v.* Allen, 53 Mo., 44; St. Joseph *v.* Anthony, 30 Mo., 538; Neenan *v.* Smith, 50 Mo., 258; Kiley *v.* Cranor, 57 Mo., 541; Rutherford *v.* Hamilton, 97 Mo., 543; Moberly *v.* Hogan, 131 Mo., 19; Farrer *v.* St. Louis, 80 Mo., 379.

In the last-mentioned case Judge Norton for the court said: "The liability of lots fronting on a street, the paving of which is authorized to be charged with the cost of the work according to their frontage, having been thus so repeatedly asserted, the ques-
113 tion is no longer an open one in this State, and we are relieved from the necessity of examining authorities cited by counsel for plaintiff condemning what is familiarly known as the 'front foot rule.'"

Learned counsel for defendant concede such was the state of the decided law of this State, and that the portion of the Kansas City charter known as the ninth article of the charter, which authorizes the cost of a pavement to be assessed against the lots fronting on the improvement according to their respective frontage, was framed after this court had fully considered and construed similar laws and sustained them against the charge of unconstitutionality, and the assessment now challenged was made under the construction given by this court.

They say: "The question we present is whether under the decision in Norwood *v.* Baker, 172 U. S., 269, the provision of the Kansas City charter under which the tax bill sued on was issued is in violation of the Constitution of the United States, and therefore null and void. We do not and cannot ask this court to reconsider or recast any of its former decisions on this subject. We simply present

this controlling decision of the Supreme Court of the United States, and ask that it be applied in this case."

If the facts of this case bring it within the case in judgment in Norwood *v.* Baker this court is bound to follow that decision and will do so whatever views we may hold to the contrary.

In applying the principle of *stare decisis* and controlling authority we will be safe in following that doctrine as announced by the Supreme Court of the United States, whose judgment on the question at bar will be final. In Cohens *v.* The State of Virginia, 6 Wheaton (U. S.), 399, Chief Justice Marshall said:

"The counsel for the defendant in error urge in opposition to this rule of construction some dicta of the court in the case of Marbury *v.* Madison.

114 "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for judgment. The reason for this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." Further on he says, in reference to language used in Marbury *vs.* Madison: "Having such cases only in its view, the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principles," and he concludes this point with the announcement that "the general expressions in the case of Marbury *v.* Madison must be understood with the limitations which are given them in this opinion."

In the recent case of Parsons *v.* District — Columbia, 170 U. S., 45, the same court says: "It is trite to say that general principles announced by courts which are perfectly sound expressions of the law under the facts of a particular case may be wholly inapplicable in another and different case, and there is scarcely any department of the law in which it is easier to collect one body of decisions and contract them with another in apparent conflict than that which deals with the taxing and police powers."

However familiar the facts in the Norwood-Baker case may be, owing to the great interest excited by its promulgation, it will not be amiss to recall its salient features for the purpose of determining its controlling effect in the case at bar.

Mrs. Ellen R. Baker owned a tract of land in the village of Norwood which intercepted Ivanhoe avenue. This avenue was
115 fifty feet wide and had been laid out to the north and south lines of her tract. To make Ivanhoe avenue a continuous street it was necessary to extend it through the Baker tract and acquire a strip thereof fifty feet wide and three hundred feet long.

For this purpose a condemnation proceeding was instituted. The constitution of Ohio provides that where private property is con-

demned for public use "compensation therefor shall first be made in money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

Cities and villages in Ohio, as in Missouri, are by statute given power to lay off, establish, open, widen, narrow, straighten, extend, keep in order and repair, and light streets, alleys, public grounds and buildings, wharves, landing places, bridges, and market places within the corporation, and to appropriate private property for the use of the corporation, and each city and village may appropriate, enter upon, and hold real estate within its corporate limits for the following purposes, but no more shall be taken or appropriated than is reasonably necessary for the purpose to which it is to be applied: "For opening, widening, straightening and extending streets, alleys and avenues, also for obtaining gravel or other material for the improvement of the same and for this purpose the right to appropriate shall not be limited to lands lying within the limits of the corporation." 1 Rev. Stats. Ohio (1890), s. 1692, sub. div. 18 & 33, & section 2232, p. 429 & 430, title, "Cities & villages."

It is further provided by the Statutes of Ohio (1890) that where private property is taken for opening and widening streets, alleys, or other public highways the costs and expenses of the appropriation may be assessed in one of three ways: First, by the council generally upon the public; second, upon abutting, adjacent, or contiguous
116 lots, in proportion to the benefits which may result from the improvement or according to the value of the property assessed, third, "by the front foot of the property bounding and abutting upon the improvement, as the council by ordinance setting forth specially the lots and lands to be assessed, may determine before the improvement is made." Sect. 2264, R. S. Ohio 1890.

The council of the village of Norwood passed an ordinance which provided for the institution of condemnation proceedings in the probate court, for the ascertainment of the compensation to be paid to Mrs. Baker for the desired strip, and also provided that the compensation paid her and all costs of the condemnation proceedings and all other costs and the interest on the bonds issued, if any, to pay her for her land should be assessed as a benefit to her upon her land abutting on the strip so taken.

It thus appears that the village was invoking at one and the same time the extraordinary power of eminent domain and exercising its power of assessment to pay for the land thus taken.

In the condemnation proceeding proper the jury assessed her compensation at two thousand dollars, and that sum was paid her, and thereupon the village council assessed her with the two thousand dollars and all costs of the condemnation, amounting to $218.58, as benefits to her abutting property.

The result being that the village acquired her property for nothing and charged her $218.58 for having deprived her of it.

Mr. Justice Harlan delivered the opinion of the court. He said: "The particular question presented for consideration involves the validity of an ordinance of that village assessing upon the appellee's land abutting on each side of the new street an amount covering

not simply a sum equal to that paid for the land taken for the street, but in addition the costs and expenses connected with the condemnation proceedings."

The lower court adjudged that the assessment was in violation of the fourteenth amendment to the Constitution of the United
117 States, and such was the theory of the bill for injunction. *Inter alia* Judge Harlan says: "It has been adjudged that the due process of law prescribed by the (fourteenth) amendment requires compensation to be made to the owner when private property is taken for public use." R'y *v.* Chicago, 166 U. S., 226; Supply Co. *vs.* Brooklyn, 166 *N.* S., 685.

"The taking of the plaintiff's land for the street was under the power of eminent domain." * * * "But the assessment of the abutting property * * * was an exercise of the power of taxation." "Except for the provision of the constitution of Ohio above quoted, the State could have authorized benefits to be deducted from the actual value of the land taken without violating the constitutional injunction that compensation be made for private property taken for public use, for the benefits received could be properly regarded as compensation *pro tanto* for the property appropriated to public use." But, asks the learned justice, does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon the abutting property the sum paid for it, together with the entire costs incurred in the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street? The learned justice then concedes that it is the settled law of the Supreme Court of the United States that "abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property, such assessments resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements, citing Mobile County *v.* Kimball, 102 U. S., 691; Railroad *v.* Decatur, 147 U. S., 190; Baumen *v.* Ross, 167 U. S., 548, and the cases there cited. He adds that "according to the weight of judicial authority the legislature has a large discretion in defining the territory so deemed specially benefitted by a public improvement, which,
118 may be subjected to special assessment to meet the cost of such improvements.

He proceeds then to show that the power of the legislature is not unlimited, and that there is a point beyond which the legislative department may not go in exerting its power of taxation consistently with the property rights of the citizen.

He concludes: "In our judgment the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of the excess, a taking, under the guise of taxation, of private property for public use without compensation."

The learned justice, speaking for the majority of the court, expressly disclaimed that his opinion was in conflict with Parson *v.*

Dist. of Columbia, 170 U. S., 45, or Spencer *v.* Merchant, 125 U. S., 345.

From a careful reading of the case, we conclude that the Supreme Court decided three propositions:

First. That "due process of law," as used in the fourteenth amendment to the Federal Constitution, requires compensation to be made to the owner of the land condemned for public use.

Second. That the exaction from the owner of abutting property of the cost of a public improvement in substantial excess of the special benefits received by him is, to the extent of such excess, a taking under the guise of taxation, of private property for public use without compensation.

Third. That in that case the special assessment upon the abutting property of Mrs. Baker, the entire cost of opening the street, including not only the full amount paid her for the strip condemned, but the costs and expenses of the condemnation proceedings, was a taking of her property for public use without compensation; in a word, that while nominally it was the exercise of the taxing power, it was nothing less than confiscation.

Notwithstanding the fact that the discussion took a wide
119 range and much that was said affords ground for the contention of learned counsel that all statutes and ordinances which assess abutting owners with the cost of paving a street according to the front-foot rule, as the charter and ordinance of Kansas City do in the case at bar, are null and void, we are of opinion that it was not the intention of the majority of the court to so hold. We think that Norwood *v.* Baker must be read with a view to the particular facts in judgment in that case, and that it was not the intention of the Supreme Court of the United States to overturn the long line of its own decisions which are in harmony with so many of the decisions of the courts of last resort in the several States of the Union and upon the faith of which vast property rights have accrued.

Indeed, as we understand, the opinion of the court expressly declined to shake the authority of Parsons *v.* The District of Columbia, 170 U. S., 45, in which that court sustained an assessment per front foot upon property abutting upon a street improvement. In that opinion each of the justices who concurred in the majority opinion in Norwood *v.* Baker concurred.

In the Parsons case the Supreme Court adopted the language of Judge Dillon in his work on Municipal Corporation (4th ed.), vol. 2, s. 752, as follows:

"The courts are very generally agreed that the authority to require the property specially benefitted to bear the expense of local improvements is a branch of the taxing power or included within it.

"Whether the expense of making such improvement shall be paid out of the general treasury or be assessed upon the abutting property or other property specially benefitted, and if in the latter mode, whether the assessment shall be upon all property found to be benefitted or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of
120 authority considered to be a question of legislative expediency."

And the court expressly approved the doctrine of Spencer

v. Merchant, 125 U. S., 345, which case originated in New York. The court of appeals of New York, in an opinion by Judge Finch, held that assessments of abutting property is an exercise of the power of taxation and is vested in the legislature, which determines the amount to be levied and fixes the tax district, and its decision is final. The Supreme Court of the United States in its opinion in the same case said: "The legislature in the exercise of its power of taxation has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading, or repairing of a street, to be assessed upon the owners of lands benefitted thereby, and the determination of the territorial districts which should be taxed for a local improvement is within the province of legislative discretion."

In Williams *v.* Eggleston, 170 U. S., 304, the same court said: "Neither can it be doubted that if the State constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefitted by a proposed improvement." To the same effect see Mobile County *v.* Kimball, 102 U. S., 691. In Bauman *v.* Ross, 167 U. S., 548, the court said: "But it is for the legislature and not for the judiciary to determine whether the expense of a public improvement should be borne by the whole State or by the district or neighborhood immediately benefitted."

"The legislature in the exercise of the right of taxation has the authority to direct the whole or such part as it may prescribe of the expense of a public improvement, such as the establishing the widening, the grading, or the repair of a street, to be assessed upon the owners of lands benefitted thereby."

121 "The rule of apportionment among the parcels of land benefitted also rests within the discretion of the legislature and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners."

Some stress is laid upon the distinction between the power of the legislature in the exercise of the taxing power and that of municipalities upon which that power is conferred. But few principles are better settled in the courts of this country than this, that where legislative powers are delegated to a municipal corporation its discretion within the legitimate sphere of its authority is proportionately as wide as is the like discretion possessed by the legislature of the State, "and as free from outside interference, and that discretion is not subject to judicial revision or reversal." Morse *v.* Westport, 136 Mo., 286.

It is true that in many jurisdictions—certainly in this State it is true that municipal acts, whether in the form of ordinances or resolutions, may be impeached for fraud at the instance of persons injured thereby. 1 Dillon Mun Corp. (4th ed.), § 311; Glasgow *v.* St. Louis, 107 Mo., 203. Whereas courts will not inquire into the motives of the legislature.

That the legislature may delegate this power to open, improve,

and pave streets to municipal corporations is no longer an open question.

That the charter of Kansas City fully and expressly conferred this power upon that city will not be questioned; that charter has all the dignity and force of a legislative enactment. In the case at bar there was not the slightest intimation that the ordinance was procured by fraud or amounted to arbitrary confiscation, whereas in the Norwood case the ordinance was arbitrary and oppressive and could only result in depriving Mrs. Baker of her land for a
122 public use without compensation. Under the scheme there devised, although Mrs. Baker might have been allowed every process of law to recover the value of her land taken, and a hearing as to how the value of the land taken should be apportioned over the benefit district, she could never, unless the district was enlarged, have recovered a cent for her land that was taken, and all additional efforts would simply have increased the costs which she was adjudged to pay, and thus the case properly fell within the rule announced by Mr. Justice Harlan in Railroad Co. *v.* Chicago, 166 U. S., 226, that "the mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process into due process of law if the necessary result be to deprive him of his property without compensation."

But in taxing the citizen with his proportionate share of the cost of a pavement abutting on his lot there is no taking of property for public use.

Nor is there anything which smacks of arbitrary or fraudulent conduct. This method of taxation has passed under the scrutiny of the courts of this country and has received their approval. Judge Cooley in his work on Taxation, p. 644, says: "Such a measure of apportionment seems at first blush to be perfectly arbitrary and likely to operate in some cases with great injustice, but it cannot be denied that in the case of some improvements frontage is a very reasonable measure of benefits—much more than value could be—and perhaps approaching equality as nearly as any other estimate of benefits made by the judgment of men." Judge Elliott in his book on Roads and Streets, p. 396, says: "The system which leads to the least mischievous and unjust consequences is that which takes into account the entire line or the way improved and apportions the expense according to the frontage, for it takes into construction the benefit to each property-owner that accrues from the improvement of the entire line of the way and does not impose upon one lot-owner an unjust portion of the burden."

123 Judge Sharswood, speaking for the supreme court of Pennsylvania in Hammett *v.* Philadelphia, 65 Penn. St., 146, says: "Perhaps no fairer rule can be adopted than the proportion of feet front, though there must be some inequalities if the lots differ in situation and depth." Such has been the holding of this court throughout its history.

A rule so universally adopted and sustained can hardly be called arbitrary or so unjust as to warrant a court to strike down the discretion of the municipality which adopts it.

It is, however, insisted that the Norwood-Baker case does condemn this front-foot rule because it affords no opportunity for a hearing. Still, conceding as we do that there are expressions to this effect in that opinion, it seems so clear to us that the opinion was not predicated upon the want of notice, and that no amount of notice could have availed to secure justice to Mrs. Baker under the scheme devised, that we do not believe that the Supreme Court intended to lay down the law that a State statute imposing taxes must necessarily and in all cases gives notice and a hearing to the tax-payer before it can be held valid.

We think the decisions of that court are overwhelmingly to the contrary, and we discern no purpose in this opinion to overrule and set aside all of its prior utterances on this subject.

Thus in Parsons *v.* District of Columbia, 170 U. S., the court unanimously said: "In Hagar *v.* Reclamation District, 111 U. S., 701, the distinction between a tax or assessment imposed by a direct exercise of the legislative power calling for no inquiry into the weight of evidence nor for anything in the nature of a judicial examination and a tax or assessment imposed upon property according to its value to be ascertained by assessors upon evidence was pointed out, and it was held that in the former case no notice to the owner is required, but that in the latter case the officers in estimating the value act judicially and notice and an opportunity to be heard are necessary." "In giving the opinion of the court it was
124 said by Mr. Justice Field (p. 709): "Of the different kinds of taxes which the State may impose, there is — vast number of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes, and generally specific taxes on things or persons or occupations." In such cases the legislature in authorizing the tax fixes its amount, and that is the end of the matter. If the tax be not paid the property of the delinquent may be sold, and he be thus deprived of his property; yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence or other element of a judicial nature and nothing could be changed by hearing the tax-payer. "No right is therefore invaded."

The court further quote Judge Cooley on Taxation with approval to the effect "that the whole cost (of a local improvement) in other cases is levied on lands in the immediate vicinity of the work." "In a constitutional point of view either of these methods is admissible, and one may be sometimes just and *and* another at other times."

"The question is legislative, and, like all legislative questions, may be decided erroneously." The court thus approves Judge Dillon's text, "Mun. Corp., vol. 2, § 752," wherein the learned author says: "Whether the assessment shall be upon all property found to be benefitted or alone upon the abutters, according to frontage to a rear of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency," and, in Norwood *v.* Baker, Parson *v.* Columbia is expressly approved by Mr. Justice Harlan on the ground that it was done under an act of Congress

establishing a comprehensive system for the District. From the reasoning of the learned justice it is hard to escape the conclusion that he regarded the fact that the entire cost of the land taken and all the costs of the condemnation *was* assessed upon Mrs.
125 Baker's land as peculiar to that case, and that a different rule would govern if the assessment per front foot had been levied under a general or comprehensive system for betterments, as was the case in Parsons *v.* Columbia, and which clearly exists under the charter and ordinance of Kansas City which provide a comprehensive system for the paving of all the streets of said city and an assessment per front foot upon all abutting property to pay therefor. It seems indisputable that if no inquiry into benefits was required in the Parsons case, and that act was constitutional, neither can the charter and ordinance of Kansas City which also provide a comprehensive system of improvement be held unconstitutional. In neither case is there any inquiry as to benefits nor is the tax levied according to actual benefit, but both alike rest upon the conclusive presumption indulged by Congress in the one case, and the charter in the other, that such an improvement is a benefit to the abutting property. Not only is this true, but the Supreme Court of the United States is solemnly committed to the doctrine that if the assessment actually exceeds the cost of the work it would not vitiate or annul the assessment. Parsons *v.* Columbia, 170 U. S., loc. cit., 5657; Leominsted *v.* Conant, 139 Mass., 384; Hyde Park *v.* Spenver, 118 Ill., 446.

Whether there is really a distinction between the Parsons case and the Norwood-Baker if the fact of the taking of Mrs. Baker's land without compensation be dissociated from the latter, we will not now discuss, but accepting the whole of the Norwood case, its approval of the Parson case, as well as the statement that the front-foot rule excluded an inquiry into benefits, we are of opinion that the Supreme Court of the United States will not condemn the assessment in the case at bar, because it falls clearly within the doctrine of the Parsons case and the construction placed on that case in the Norwood case, and because no court has more emphatically determined that an assessment by the front-foot rule is an
126 exercise of the taxing power and is a legislative function with which the courts have no power to interfere and will not do so. Certainly it is true that until the decision in the Norwood-Baker case, the decisions of the Supreme Court hold that the fourteenth amendment to the Constitution of the United States does not prohibit assessments on real estate in excess of special benefits, or by methods other than according to special benefits.

In the case of Davidson *vs.* New Orleans, 96 U. S., 97, the estate of John Davidson was assessed about $50,000 for draining certain swamp lands in the State of Louisiana. The assessment was levied according to the superficial area or square fee- of land within the drainage district; that in each square foot was taxed as much as every other square foot in the district.

No inquiry was had into benefits and the assessment was not according to benefits. It was even agreed that no drainage was

done on Davidson's land, and that a part of his land needed no drainage, having already been drained.

The question was squarely raised and presented whether the fourteenth amendment prohibited such an assessment. Justice Miller wrote the opinion, in which all the justices concurred, and held that the Supreme Court of the *the* United States had no jurisdiction of the case, because the fourteenth amendment was not violated; that that class of cases did not fall within the provisions of the amendment. In the course of his opinion the learned judge says; "It is also said that part of the property of plaintiff which was assessed is not benefitted by the improvement. This is a matter of detail with which this court cannot interfere if it were clearly so; but it is hard to fix a limit within those two parishes where property would not be benefitted by the removal of the swamps and marshes which are within their bounds."

127 At that time it is clear that the whole court held that the fact that an assessment was for an improvement which in fact was no benefit to the property-owner did not bring the case within the fourteenth amendment, and it would be hard to conceive of a harder case.

Subsequently in Spencer *v.* Merchant, 125 U. S., 245, Mr. Justice Gray said: "In Davidson *v.* New Orleans it was held that if the work was one which the State had authority to do and pay for by assessments on the property benefitted, objections that the sum raised was ex*h*orbitant or that part of the property assessed was not benefitted presented no question under the fourteenth amendment to the Constitution upon which this court could review the decision of the State court."

And in Watson *v.* Nevin, 128 U. S., 578, Chief Justice Fuller said in reference to the Davidson case: "And the conclusion was reached that neither the corporate agency by which the work is done, — the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed are matters in which the State authorities are controlled by the Federal Constitution. So the determination of the taxing district and the manner of the apportionment are all within the legislative power." Spencer *v.* Merchant, 125 U. S., 345; Stanley *v.* Supervisors, 121 U. S., 535; Mobile *v.* Kimbell, 102 U. S., 691; Hagar *v.* Reclamation Dist., 111 U. S., 701; United States *v.* Memphis, 97 U. S., 284; Laramie Co. *v.* Albany Co., 92 U. S., 307.

"And whenever the law operates alike on all persons and property similarly situated equal protection cannot be said to be denied." Wurts *v.* Hoagland, 114 U. S., 606; R. R. *v.* Richmond, 96 U. S., 521.

128 In Watson *vs.* Nevin, the assessment for the construction of a street was apportioned upon abutting land acording to the number of square feet. No inquiry could have been made as to benefits any more than in the Norwood case, and yet the court ruled it fell within the Davidson case and it had no jurisdiction.

Finally, in Gallbrook Irrigation District *v.* Bardley, 164 U. S., 112, an ad valorem assessment upon all the land within the district was held not contrary to the fourteenth amendment.

The point was specifically made that the assessment was not made in accordance with and in proportion to the benefits conferred by the improvement and land which could not be benefitted was placed in a district to be taxed to pay for the improvement which would benefit others.

The importance of the case is suggested by the great array of eminent counsel on both sides.

Mr. Justice Peckham delivered the opinion. Among other things he said: "As was said by Mr. Justice Miller in Davidson *v.* New Orleans, where the objection was made that part of the property was not in fact benefitted, this is a matter of detail with which this court cannot interfere if it were clearly so, but it is hard to fix a limit within these two parishes where property would not be benefitted by the removal of the swamps and marshes which are within their bounds." To the same effect, Spencer *v.* Merchant, 125 U. S., 345, Lent *v.* Tillson, 140 U. S., 316–333. In regard to the matters thus far discussed, we see no valid objection to the act in question. Again, he says: "The fourth objection, and also the objection above alluded to as the final one, may be discussed, together as they practically cover the same principle. It is insisted that the basis of the assessment upon the lands benefitted for the cost of the construction of the works is not in accordance with and in proportion to the benefits conferred by the improvement, and therefore
129 there is a violation of the constitutional amendment referred to and a taking of the property of the citizen without due process of law. Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation."

And again: "We do not discover and our attention has not been called to any case in this court where such an assessment has been held to violate any provision of the Federal Constitution. If it do not, this court can grant no relief."

It is in view of this unbroken chain of authority, this unanimous declaration of the Supreme Court that the fourteenth amendment to the Federal Constitution does not prohibit assessments on real estate for local improvements in excess of special benefits or by methods other than according to the amount of the benefits, and the failure of that court to criticise or overrule any of said decisions that we say that in a case like the one at bar, involving only an assessment or no question of taking private property for public use without compensation, there is no Federal question, and that the Norwood-Baker case does not apply to such a case and does not require that we should overrule the long line of cases decided by this court which sustains the front-foot rule, and that until that court in a case like this shall reverse its former long line of decisions we must adhere to our own construction of our Constitution and laws. Of course, if the Supreme Court shall in a case like this hold that the fourteenth

amendment does apply and that the assessment by the front-foot
ule under the Kansas City charter is void, we shall conform to its
udgment as the final arbiter under the Constitution.

As the assessment was made in strict compliance with the charter
and ordinance, we do not think the testimony of the four
130 witnesses to the effect that the benefits to the lots exceeded the
cost of the improvement could cure the vice, if any, in the
harter and the ordinance.

Plaintiff must stand or fall by the charter provision. The admis-
ion of the evidence, however, did not constitute reversible error, as
ve hold the charter and the ordinance were sufficient without the
vidence, and would have been had it been to the contrary.

II.

The other objection remains.

It is urged that the requirement of the ordinance and contract
providing for maintaining and repairing the street on which the
paving was done for five years is *ultra vires* on the part of the city
and void; that the power of the city to contract for repairs is
limited to two years. Speaking for myself, I think the contention
of the defendant is sound, but this court has ruled otherwise in
Seaboard National Bank *vs.* Woesten, 147 Mo., 467, and Barber
Asphalt Co. *v.* Ullman, 137 Mo., 543, and no good purpose will be
subserved by repeating the grounds upon which I based my dissent
in those cases. The question must be considered settled by the
majority opinions in these cases.

It follows that the judgment of the circuit court must be, and is,
affirmed.

Sherwood, Robinson, Brace, Marshall, and Valliant, JJ., concur.

JAS. B. GANTT.

And afterwards, to wit, on the 15th day of November, 1900, the
further following proceedings were had in said cause, viz:

BARBER ASPHALT PAVING COMPANY, Respondent,
vs.
MARGARET FRENCH ET AL., Appellants.

Now, at this day, there is presented to the Honorable James B.
Gantt, chief justice of the supreme court of the State of
131 & 132 Missouri, a writ of error to the Supreme Court of the
United States, a citation directed to said respondent,
citing and admonishing it to appear at a Supreme Court of the
United States on the 14th day of December, 1900; a petition in
error, an assignment of errors, and a bond in the sum of one thou-
sand dollars; which said writ of error is allowed, said citation signed,
and said petition in error, assignment of errors filed, and said bond
approved, ordered filed, and made a part of the record herein.

* * * * * * *

133 And said assignment of errors is in words and figures as
follows, to wit:

Supreme Court of the United States, October Term, 1900.

MARGARET FRENCH and HENRY FRENCH, OLIVER H. DEAN, Trustee for William D. McLeod, and William D. McLeod, Plaintiffs in Error,

against

THE BARBER ASPHALT PAVING COMPANY, Defendant in Error.

134 Come now Margaret French and Henry French, Oliver H. Dean, trustee for William D. McLeod, and William D. McLeod, plaintiffs in error, by their counsel, and respectfully represent that they feel themselves to be aggrieved by the proceedings and judgment of the supreme court of the State of Missouri, in bank, in the above-entitled cause and assign error thereto as follows:

First.

The tax bill sued on was issued under a contract and ordinance purporting to be authorized by the city charter of Kansas City and article IX of said city charter, a public law of the State of Missouri. There was no other or further authority for the work or the contract or the ordinance or the special tax bill. The city charter of Kansas City purports to authorize and in form authorizes the city to cause its streets to be paved at the expense and cost of the adjoining and abutting property according to the frontage, without reference to any benefit to the property (so charged and taxed) by reason of such paving, and said State law is contrary to the Constitution of the United States and the fourteenth (14th) amendment thereto. These plaintiffs in error are deprived of their property without "due process of law." The circuit court of Jackson county, Missouri, erred in holding said city charter to be valid and the supreme court of the State of Missouri, in bank, erred in affirming such judgment and in holding said State law to be valid.

Second.

These plaintiffs in error specially set up the invalidity of the charter of Kansas City in their answer in the Jackson circuit court, and they asked an instruction that under the pleadings and evidence the plaintiff therein, The Barber Asphalt Paving Company, could not recover, and another instruction to the effect that the charter of Kansas City, in attempting to authorize the pavement of the streets of the city and charge the whole cost thereof to the adjoining property abutting on the street, without reference to any special

135 & 136 and peculiar benefits to such property was contrary to the Constitution of the United States and the fourteenth amendment thereto, and therefore void. These plaintiffs in error asked the Jackson circuit court to give said instructions and each of them, but said court refused to give them or either of them, and these plaintiffs in error then and there excepted, and in due time, after verdict and judgment, filed their motion for a new trial, on the ground, among others, that the court erred in refusing to give said instructions or either of them, but that court refused to grant a new

trial and plaintiffs in error duly excepted at the time, and on appeal of said cause to the supreme court of the State of Missouri, in bank, these plaintiffs in error assigned as error the action of the Jackson circuit court in refusing to give said instructions or either of them and in refusing to grant a new trial. But on argument of said cause in the supreme court of the State of Missouri, in bank, said court affirmed the judgment of the court below and held that the charter of Kansas City was not contrary to the Constitution of the United States or the fourteenth amendment thereto, and in so holding the supreme court of the State of Missouri erred.

The supreme court of the State of Missouri erred in holding that the charter of Kansas City was a valid law; that court erred in holding that it was a valid authority or any authority for the ordinance or the contract or the tax bill. Said charter is void.

Wherefore the said Margaret French and Henry French, Oliver H. Dean, trustee for William D. McLeod, and William D. McLeod, plaintiffs in error, pray the honorable court to examine and correct the errors assigned, and for a reversal of the judgment of the supreme court of the State of Missouri, in bank, entered in the above-entitled cause, and to enter judgment in this court for these plaintiffs in error.

HENRY FRENCH,
MARGARET FRENCH,
OLIVER H. DEAN,
Trustee for William D. McLeod, and
W. D. McLEOD, *Petitioners.*
By HENRY N. ESS, *Their Attorney.*

* * * * * * *

137 STATE OF MISSOURI, *set:*

I, Jno. R. Green, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true, and complete transcript of the record and proceedings in the above-entitled cause, as fully and complete as the same appears of record and on file in my said office.

Seal of the Supreme Court of Missouri.

In witness whereof I have hereunto set my hand as clerk and affixed the seal of said court.

Done at office, in the city of Jefferson, this 21st day of November, A. D. 1900.

JNO. R. GREEN, *Clerk.*

138 In the Supreme Court of the United States of America, Held at the City of Washington, District of Columbia.

MARGARET FRENCH, HENRY FRENCH, OLIVER H. DEAN, Trustee for William D. M'Cleod, and William D. M'Cleod, Plaintiffs in Error,

vs.

THE BARBER ASPHALT PAVING COMPANY, Defendant in Error.

Stipulation as to Printing Record.

It is hereby stipulated and agreed by and between Edward L. Scarritt, of counsel for defendant in error, and Henry N. Ess, of counsel for plaintiffs in error, that in the printing of the record in the above-entitled cause now filed in this court and brought here by writ of error to the supreme court of the State of Missouri the clerk of the Supreme Court of the United States shall omit the following parts thereof. (The pages referred to in this stipulation are the pages of the original record filed herein and numbered in red ink in the lower, left-hand corner.)

First. Omit the citation and service thereof on page 3.

Second. Omit the answer to each of the second, third, and fourth counts in the petition, as the answer to each of these counts in the petition is identical with the answer to the first count. The part to be omitted begins on page 25, three lines from the bottom, and ends on page 57, with the signature of "Ess & Georgen, attorneys for defendants."

Third. Beginning on page 63, four lines from the top, are copied the tax bills sued on. These end on page 66 with signature, "Peter H. Tiernan, president, by John Malony." In printing omit these. They are copied in the petition and need not be printed a second time.

Fourth. On pages 75 and 76 omit sections of ordinance offered in evidence No. 1023, 1024, 1025, 1026, and 1027. They pertain to the maintenance of the pavement and are immaterial to the questions to be decided in this case.

139 Fifth. Omit the testimony of Henry R. Kason and E. B. Demareston, pages 76 to 80. This pertains only to the durability of the pavement and is immaterial.

Sixth. Omit pages 85, 86, 87, 88, 89, and the first two lines on page 90, and omit beginning on page 94 with the words "Maintenance of pavement" to the words "General stipulation," on page 95. These are minute specifications and details of the pavement not necessary to the decision of the questions in hand.

Seventh. Under general stipulations, on page 95, after the words "which follows," omit those paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, and 13. These stipulations are immaterial.

Eighth. On page 101 omit bond for maintenance and official approvals following it.

Ninth. On page 106 omit official certificate of Morris E. Jones, official stenographer.

Tenth. Omit bond for appeal, beginning at bottom of page 106 and ending at bottom of page 107.

Eleventh. Omit affidavit for appeal on page 108.

Twelfth. Omit the petition in error on pages 131, 132, and 133, as the errors appear in the assignment of errors and in the briefs to be filed.

Thirteenth. Omit bond for supersedeas on pages 136 and 137.

The clerk of the Supreme Court of the United States is requested to omit printing the portion of the record indicated in the foregoing stipulation, as the printing of them can subserve no useful purpose.

EDWARD L. SCARRITT,
Counsel for Defendant in Error.
HENRY N. ESS,
Counsel for Plaintiffs in Error.

140 [Endorsed:] Margaret French *et al.*, plaintiffs in error, *vs.* The Barber Asphalt Paving Co., defendant in error. Stipulation as to printing record. Henry N. Ess, counsel for plaintiffs in error. Edward L. Scarritt, counsel for defendant in error.

141 [Endorsed:] File No., 17,983. Supreme Court U. S., October term, 1900. Term No., 498. Margaret French *et al.*, P. E., *vs.* The Barber Asphalt Paving Company. Stipulation as to printing record. Filed Dec. 5, 1900.

Endorsed on cover: File No., 17,983. Missouri supreme court. Term No., 498. Margaret French & Henry French, Oliver H. Dean, trustee for W. D. McLeod, and William D. McLeod, plaintiffs in error, *vs.* The Barber Asphalt Paving Company. Filed December 6th, 1900.